



# **Australian Law Reform Commission**

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## **Discussion Paper 64**

### **The judicial power of the Commonwealth**

**A review of the *Judiciary Act 1903*  
and related legislation**

You are invited to make a submission  
or comment on this Discussion Paper

**DP 64  
December 2000**

How to make comments or submissions

You are invited to make comments or submissions on the issues raised in this Paper, which should be sent to

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**Closing date: 16 March 2001**

It would be helpful if comments addressed specific issues or paragraphs in the Paper.

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**ALRC reference:** ALRC DP 64  
**ISBN:** 0642 70502 X

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## Terms of reference

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### REVIEW OF THE JUDICIARY ACT 1903

I, DARYL WILLIAMS, Attorney-General of Australia, HAVING REGARD TO:

- ?? the need for clear and comprehensive legislative provisions for the exercise and distribution of the judicial power of the Commonwealth; and
- ?? various judicial decisions, including the recent decisions in *Commonwealth v. Mewett* and *Re The Residential Tenancies Tribunal of New South Wales and Henderson*; *ex parte Defence Housing Authority* which have raised issues in relation to claims brought in federal jurisdiction, including claims against the Commonwealth;

REFER to the Australian Law Reform Commission for inquiry and report under the *Australian Law Reform Commission Act 1996* the following matters:

- (a) whether the provisions relating to and governing the exercise of the judicial power of the Commonwealth in civil matters, contained in the *Judiciary Act 1903* and related Acts, establish and apply the most appropriate arrangements for the efficient administration of law and justice in the exercise of federal jurisdiction;
- (b) whether any changes are desirable, include the appropriate legislative means of giving effect to any desirable changes, having regard to any constitutional limitations on the exercise of the judicial power of the Commonwealth; and
- (c) any related matter.

The Commission shall consider:

- ?? the source, scope and exercise of the judicial power of the Commonwealth in civil matters;
- ?? the conferral of federal jurisdiction on federal and State courts;
- ?? the conferral of jurisdiction on Territory courts under Commonwealth laws;
- ?? the impact of self-government on the exercise of jurisdiction in Territory Courts under Commonwealth laws;
- ?? whether it is appropriate or necessary for provisions of Part IXA of the *Judiciary Act* relating to the Northern Territory to be replicated for the Australian Capital Territory;

- ?? whether the procedural provisions dealing with the High Court included in the Judiciary Act would be better placed in another Act;
- ?? the operation of Part VII of the Judiciary Act and particularly the workings of s.44 dealing with the remittal of matters by the High Court to other courts;
- ?? whether the provisions of Part IX and Part XI Division 2 of the Judiciary Act relating to or affecting proceedings involving the exercise of federal jurisdiction, including claims against the Commonwealth, continue to be appropriate, and in particular,
  - (a) whether Commonwealth legislation should deal in greater detail or differently with the law that is to apply in proceedings involving the exercise of federal jurisdiction, including matters relating to or affecting claims against the Commonwealth, instead of placing continued reliance on the various State/Territory laws. In this connection, particular consideration should be given to whether provision should be made in relation to
    - (i) limitation periods applicable to actions against the Commonwealth; and
    - (ii) the basis on which interest is awarded in relation to judgments against the Commonwealth.
  - (b) whether, and if so the extent to which, there is a need for general legislative provision, such as s.64 of the Judiciary Act, in relation to the rights of a party created by or under a statute to which the Commonwealth is not otherwise subject.

In light of the current consideration being given to options to deal with the consequences of the decision of the High Court in the *Wakim* case, including a possible constitutional amendment, the Commission is not to examine this issue as part of this Reference.

IN PERFORMING its functions in relation to this Reference the Commission shall

- (i) consult with relevant bodies, and particularly with
  - ? the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and other State and Territory courts exercising federal jurisdiction or jurisdiction under Commonwealth laws
  - ? relevant federal departments and agencies,
  - ? the Law Council of Australia, law societies, bar associations, legal aid commissions, community legal centres and national groups representing business and consumers; and



- (ii) in recognition of work already undertaken, have regard to relevant reports, and any steps taken by governments and courts to implement their recommendations.

IN MAKING ITS REPORT the Commission will also have regard to its function in accordance with section 21(1)(b) of the *Australian Law Reform Commission Act 1996* to consider proposals for making or consolidating Commonwealth laws in relation to matters referred to it.

THE COMMISSION IS REQUIRED to make a final report not later than 28 February 2001.\*

Dated 21 January 2000

[signed]  
Daryl Williams  
Attorney-General

NOTE

- \* In a letter dated 9 August 2000, the Attorney-General extended the deadline for reporting to 30 June 2001.



# Participants

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## The Commission

The Division of the Commission constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this reference comprises the following:

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### Deputy President

Dr Kathryn Cronin

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Ian Davis (full-time Commissioner from June 2000)

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## Abbreviations

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ACT	Australian Capital Territory
AGS	Australian Government Solicitor
AIJA	Australian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
ALRC 24	Australian Law Reform Commission Report 24 <i>Foreign state immunity</i> 1984
ALRC 26	Australian Law Reform Commission Report 26 <i>Evidence (Interim)</i> 1985
ALRC 27	Australian Law Reform Commission Report 27 <i>Standing in public interest litigation</i> 1986
ALRC 38	Australian Law Reform Commission Report 38 <i>Evidence</i> 1987
ALRC 40	Australian Law Reform Commission Report 40 <i>Service and execution of process</i> 1987
ALRC 58	Australian Law Reform Commission Report 58 <i>Choice of law</i> 1992
ALRC 78	Australian Law Reform Commission Report 78 <i>Beyond the door keeper: standing to sue for public remedies</i> 1996
ALRC 89	Australian Law Reform Commission Report 89 <i>Managing Justice: A review of the federal civil justice system</i> 2000
ALRC DP 44	Australian Law Reform Commission Discussion Paper 44 <i>Choice of law rules</i> 1990
ALRC DP 62	Australian Law Reform Commission Discussion Paper 62 <i>Review of the federal civil justice system</i> 1999
ALRI	Alberta Law Reform Institute
ASIS	Australian Secret Intelligence Service
Bowman report	J Bowman et al <i>Review of the Court of Appeal (Civil Division): Report to the Lord Chancellor</i> Lord Chancellor's Department London 1997
<i>Comcare Act</i>	<i>Safety, Rehabilitation and Compensation Act</i> 1988 (Cth)
<i>Commonwealth Electoral Act</i>	<i>Commonwealth Electoral Act</i> 1918 (Cth)
CSAA	<i>Child Support (Assessment) Act</i> 1989 (Cth)
CSOs	community service obligations
DHAA	<i>Defence Housing Authority Act</i> 1987 (Cth)

DoFA	Department of Finance and Administration
<i>Evidence Act</i>	<i>Evidence Act 1995 (Cth)</i>
<i>Family Law Act</i>	<i>Family Law Act 1975 (Cth)</i>
FCAA	<i>Federal Court of Australia Act 1976 (Cth)</i>
FCR	Federal Court Rules
<i>Federal Court of Australia Act</i>	<i>Federal Court of Australia Act 1976 (Cth)</i>
<i>Federal Magistrates Act</i>	<i>Federal Magistrates Act 1999 (Cth)</i>
FLA	<i>Family Law Act 1975 (Cth)</i>
FLR	Family Law Rules
FMA	<i>Federal Magistrates Act 1999 (Cth)</i>
FSIA	<i>Foreign States Immunities Act 1985 (Cth)</i>
GBEs	government business enterprises
GOCs	government owned corporations
HCAA	<i>High Court of Australia Act 1979 (Cth)</i>
HCR	High Court Rules
<i>High Court of Australia Act</i>	<i>High Court of Australia Act 1979 (Cth)</i>
ICCPR	International Covenant on Civil and Political Rights 1996
JA	<i>Judiciary Act 1903 (Cth)</i>
JCCVA	<i>Jurisdiction of Courts (Cross vesting) Act 1987 (Cth)</i>
JCPAA	Joint Committee of Public Accounts and Audit
<i>Judiciary Act</i>	<i>Judiciary Act 1903 (Cth)</i>
LRCBC	Law Reform Commission of British Columbia
LRCC	Law Reform Commission of Canada
LRCWA	Law Reform Commission of Western Australia
NT	Northern Territory
NZLC	New Zealand Law Commission
OLRC	Ontario Law Reform Commission
Renton report	Great Britain Committee on the Preparation of Legislation <i>The preparation of legislation: report of a committee appointed by the Lord President of the Council</i> HMSO London 1975
SEPA	<i>Service and Execution of Process Act 1992 (Cth)</i>
TPA	<i>Trade Practices Act 1974 (Cth)</i>
<i>Trade Practices Act</i>	<i>Trade Practices Act 1974 (Cth)</i>
Woolf final report	Lord Woolf <i>Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales</i> HMSO London July 1996

# 1. Introduction

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## Why review the *Judiciary Act*?

1.1 The *Judiciary Act 1903* (Cth) is one of the Commonwealth Parliament's oldest pieces of legislation. It is also the most significant piece of federal legislation regulating the structure of the Australian judicial system. As originally enacted, the Act established the High Court, defined its jurisdiction within the limits set by Chapter III of the Constitution, and established the basic jurisdictional relationships between federal and state courts.

1.2 Over the course of nearly a century, the Act has been amended by approximately 70 separate pieces of legislation but it has never been the subject of systematic review. The Commission's current reference provides a unique opportunity to review jurisdictional relationships in the Australian judicial system, both from the perspective of underlying principle and practical operation.

1.3 Aside from the need to review the structure, organisation and coverage of the Act as a whole, there are many specific provisions that are outdated in language or content. Other provisions have no effective operation due to major legislative changes that have occurred in the interim. Such provisions may require substantial amendment or repeal.

1.4 Certain provisions of the *Judiciary Act* — such as s 64 regarding the rights of parties in suits involving the Commonwealth or the states, sections 79 and 80 regarding the law applicable in federal jurisdiction, and s 39 regarding the exercise of federal jurisdiction by state courts — have been the source of continuing controversy and debate. Review and reform of these provisions may significantly clarify the law in these areas.

1.5 Perhaps most importantly, since 1903 there have been very significant changes to the structure and operation of the federal judicial system, and these underpin the need for a comprehensive review of the *Judiciary Act*. New federal courts have been created with substantial jurisdiction in civil matters; the internal territories have been granted self-government and now exercise considerable autonomy over their judicial affairs; the expansion of civil litigation has generated concern for the efficient conduct of litigation within a federal system; and the High Court has developed new understandings about the role of Chapter III of the Constitution and its impact on federal, state and territory courts.

## **The terms of reference**

1.6 In January 2000, the Commonwealth Attorney-General, the Hon Daryl Williams AM QC MP, announced that the Commission had been given a new reference in relation to the *Judiciary Act*.<sup>1</sup> The Commission was initially asked to inquire and report by the 28 February 2001, but the Attorney-General later extended this deadline to 30 June 2001 to accommodate a delay in appointing new members to the Commission.

1.7 The terms of reference raise a large number of issues. Some are highly specific; others invite the broadest inquiry about whether the current jurisdictional arrangements best serve the interest of ‘efficient administration of law and justice in the exercise of federal jurisdiction’.<sup>2</sup>

1.8 The terms of reference also place important limits on the scope of the inquiry. First, the inquiry is confined to federal civil jurisdiction, which thus precludes consideration of those provisions of the *Judiciary Act* that deal with federal jurisdiction in criminal matters.<sup>3</sup> Second, the cross-vesting arrangements in the light of the High Court’s decision in *Re Wakim; Ex parte McNally*<sup>4</sup> are expressly excluded. That decision invalidated that part of the cross-vesting scheme that purported to invest federal courts with state jurisdiction. This matter has now been dealt with by uniform ‘saving’ legislation,<sup>5</sup> and more recently by an historic agreement between the states to refer the matter of the Corporations Law to the Commonwealth pursuant to s 51(xxxvii) of the Constitution. However, notwithstanding this exclusion, it will be necessary to refer to the cross-vesting arrangements in this Discussion Paper in order to understand the legal environment in which the federal judicial system currently operates.

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1 The terms of reference are reproduced at p 3 above.

2 See p 3.

3 See principally Pt X.

4 (1999) 198 CLR 511.

5 See eg *Federal Courts (State Jurisdiction) Act 1999* (NSW) and cognate legislation of other states and territories.



1.9 Other matters are also beyond the scope of the present inquiry. For example, amendment to Chapter III of the Constitution might be seen as a solution to some of the difficulties arising in the operation of the federal judicial system. However, the possibility of constitutional change has been considered elsewhere<sup>6</sup> and is not a central function of the Commission.

1.10 Finally, there has been recent discussion of the restrictions imposed by amendments to the *Migration Act 1958* (Cth) on the jurisdiction of the Federal Court to review migration matters. McHugh J commented recently that the amendments have caused the High Court to be

unduly burdened by trial matters ... and the reforms brought about by the [*Migration Act*] amendments are plainly in need of reform themselves if this Court is to have adequate time for the research and reflection necessary to fulfil its role as 'the keystone of the federal arch' and the ultimate appellate court of the nation. I hope that in the near future the Parliament will reconsider the jurisdictional issues involved.<sup>7</sup>

1.11 However, the Attorney-General has advised the Commission that such reconsideration was not contemplated to be within the scope of the present inquiry.

The review of the Judiciary Act is not intended to cover litigation brought either under the current judicial review scheme in the Migration Act or under the proposed new scheme in the Migration Legislation Amendment (Judicial Review) Bill.<sup>8</sup>

1.12 As well as defining the scope of the Commission's inquiry in its review of the *Judiciary Act*, the terms of reference also contemplate that the inquiry must reach beyond the confines of that Act. The terms direct the inquiry to review 'related Acts', being those that may be affected by or have an impact on the objectives of the inquiry. Related Acts that are pivotal to the exercise of federal jurisdiction include the *Family Law Act 1975* (Cth), the *Federal Court of Australia Act 1976* (Cth), the *High Court of Australia Act 1979* (Cth), and the *Federal Magistrates Act 1999* (Cth). Throughout this Discussion Paper, each of these core Acts is abbreviated, where appropriate, in accordance with the list on page 11, namely, FLA, FCAA, HCAA and FMA. The *Judiciary Act* is abbreviated to JA.

1.13 In the broadest sense, however, all federal Acts that confer jurisdiction upon federal, state or territory courts are potentially within the contemplation of this inquiry. For example, if fundamental changes were to be recommended regarding the federal jurisdiction conferred on federal or state courts, amendments would be necessary to a large number of federal Acts.

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6 *Final report of the Constitutional Commission* AGPS Canberra 1988.

7 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407, 411. See also *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57 (16 November 2000), para 133 (Kirby J).

8 D Williams *Correspondence* 28 August 2000.

## Related studies

1.14 Although the *Judiciary Act* has not previously been subject to systematic review, the Commission will be able to build on a range of work previously undertaken in relation to the subject matter of the Act.

### Judiciary Act Review Committee

1.15 A Judiciary Act Review Committee was established in 1968 and operated for two years under the chairmanship of Solicitor-General Mr RJ Ellicott QC. The Committee had two terms of reference — to review the *Judiciary Act* generally and to consider a proposed Bill to establish a national appellate court (‘the Commonwealth Superior Court’). During the course of the Committee’s inquiry, the Government decided not to proceed with the proposed Bill,<sup>9</sup> and the Committee never formally reported. However, some of the recommendations deriving from the Committee’s draft review of the Act are reflected in the 1977 amendments to the *Judiciary Act*.<sup>10</sup>

1.16 The Committee made various recommendations as to the exercise of federal jurisdiction in its draft report.<sup>11</sup> These focused on appellate procedures, rights to appeal, leave requirements in constitutional matters, and the original jurisdiction of the High Court.<sup>12</sup> In particular, the Committee concluded that the High Court ‘must be divested of a substantial part of its existing original jurisdiction’ by limiting such jurisdiction to s 75 and s 76(i) matters.<sup>13</sup>

### Advisory Committee to the Constitutional Commission

1.17 In 1987, an Advisory Committee to the Constitutional Commission reported on the Australian judicial system. The broad objective of the Committee was ‘to identify the appropriate constitutional framework for the Australian judicature’.<sup>14</sup> The Committee’s recommendations were confined to the Constitution itself, but in a number of places it considered matters relevant to the *Judiciary Act*.

1.18 Among these issues, the Committee recommended preservation of the state/federal court dichotomy in the exercise of federal judicial power; the existing appellate structure; Parliament’s constitutional powers regarding federal

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9 *Report of the Judiciary Act Review Committee — First Draft* January 1972, para 1.

10 For example, changes to the removal provisions (by repealing s 40A and amending s 40) appear to respond to the draft recommendations of the Committee: *id*, para 42.

11 This report was made available to the Commission by a former committee member, the Hon Mr Alan Neave, to whom the Commission is extremely grateful.

12 *Report of the Judiciary Act Review Committee — First Draft* January 1972, para 13–14, 16, 28.

13 *id*, para 17, 40–41.

14 Advisory Committee to the Constitutional Commission *Australian Judicial System* Commonwealth of Australia Canberra 1987, xi.

jurisdiction; and the special leave procedure for appeals to the High Court. In addition, the Committee recommended that sections 75 and 76 of the Constitution be retained, though with refinements to some paragraphs.<sup>15</sup>

1.19 The Committee also recommended certain changes to the Constitution in respect of federal jurisdiction. In its view, federal jurisdiction should be redefined and divided into three classes — ‘entrenched’ original High Court jurisdiction; original High Court jurisdiction that may be divested, but only in favour of another federal court; and other federal jurisdiction, which may be vested in the High Court, another federal court, or a state or territory court.

### Constitutional Commission

1.20 The report of the Constitutional Commission itself was released in 1988 and substantially agreed with the Advisory Committee’s recommendations regarding sections 75 and 76 of the Constitution.<sup>16</sup>

1.21 The Constitutional Commission also recommended that s 78 of the Constitution, which empowers Parliament to confer ‘rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power’, be amended to specify that such rights must be in respect of s 75 and s 76 matters.<sup>17</sup> As discussed in Chapter 5, it is possible that corresponding amendments might be desirable for sections 56 and 64 JA.

### Senate Standing Committee on Legal and Constitutional Affairs

1.22 In 1992 the Senate Standing Committee on Legal and Constitutional Affairs produced a report entitled *The doctrine of the shield of the Crown*.<sup>18</sup> The report focused on the immunities of governments when engaged in corporate or commercial activities in competition with private enterprises in the marketplace. The report discussed a number of issues relevant to the present inquiry and considered in detail in Chapter 5.

1.23 The Senate Committee supported a reversal of the presumption of Crown immunity. Its aim was to address concerns that federal government instrumentalities might use the ‘shield of the Crown’ to avoid the application of companies and securities legislation and other state laws. The Committee considered these issues in the light of s 64 JA and the High Court’s decision in *Commonwealth v Evans Deakin Industries Ltd*.<sup>19</sup>

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15 id, xiii, 127–128.

16 Constitutional Commission *Final report* AGPS Canberra 1988, 16.

17 id, 19.

18 Senate Standing Committee on Legal and Constitutional Affairs *The doctrine of the shield of the Crown* Commonwealth of Australia Canberra 1992.

19 (1986) 161 CLR 254.

## **The ALRC**

1.24 Several reports of this Commission are also relevant to the present inquiry.

### ***Standing in public interest litigation — ALRC 27, 1985***

1.25 This report was directed at the reform of the laws of standing in proceedings for mandamus, certiorari, prohibition, habeas corpus or quo warranto. It also considered injunctions or declarations regarding enforcement of public rights, statutory rights, duties or powers, and related statutory remedies.

1.26 The Commission's recommendations addressed the rights of intervention of Attorneys-General and private individuals, amicus curiae briefs and costs orders. Some of these issues were dealt with by the amendments to s 78A JA in 1988, as discussed in Chapter 3 of this Discussion Paper. Also relevant to the present inquiry is the notification given to the Attorneys-General in constitutional litigation (s 78B JA) and the role of Attorneys-General in seeking removal of constitutional litigation from lower courts to the High Court (s 40 JA).

1.27 ALRC 27 was updated and generally endorsed in 1996 by ALRC 78, *Beyond the door-keeper: Standing to sue for public remedies*, with additional emphasis on the development of national uniform laws regarding standing.

### ***Service and Execution of Process — ALRC 40, 1987***

1.28 This report was commissioned to rectify the lack of adequate provisions in the *Service and Execution of Process Act 1901* (Cth) to effect service and enforce judgments across state and territorial boundaries within Australia. The recommendations contained in ALRC 40 were substantially implemented by the enactment of the *Service and Execution of Process Act 1992* (Cth).

1.29 The 1992 Act also provides a legislative model for ensuring that proceedings are heard in the most appropriate Australian forum. The Act liberalised the test for determining whether a person who has been served with originating process can obtain a stay of proceedings on grounds that a court in another state or territory is the more appropriate forum. Various aspects of ALRC 40 are considered in Chapters 2, 3 and 6.

### ***Choice of Law — ALRC 58, 1992***

1.30 This report reviewed choice of law in the exercise of federal jurisdiction, particularly with regard to proceedings that are connected with two or more states or territories. As discussed in Chapter 6 of this Discussion Paper, the report recommended the enactment of statutory choice of law rules for all courts

exercising federal jurisdiction, and expressed the hope that states and territories would enact equivalent legislation for courts exercising state or territory jurisdiction.

1.31 Unlike ALRC 58, the present reference is not concerned with the substantive merits of alternative choice of law rules for courts exercising federal jurisdiction. Rather, this reference addresses the antecedent problem of determining how one fills gaps in federal law, which arise from the fact that the Commonwealth Parliament does not and cannot make provision for every legal issue that may arise in the exercise of federal jurisdiction. Despite the different focus of the two references there are several common issues of policy, which are explored in Chapter 6.

***Managing justice: A review of the federal civil justice system — ALRC 89, 2000***

1.32 In addition to issues such as costs, legal education, judicial accountability, practice standards and legal aid, the Commission's most recent report examined the institutions and procedures through which the judicial power of the Commonwealth is exercised in Australia. While there is overlap with the present inquiry in this general sense, the focus of the two inquiries differs.

1.33 ALRC 89 was predominantly concerned with issues of process such as case management, dispute resolution and evidentiary procedures. An underlying concern of the report was the efficacy of the adversarial system of justice and the need to reduce delay and cost within the existing system. The present inquiry, however, is directed more to jurisdictional issues arising in the exercise of the judicial power of the Commonwealth, principally as regulated by the *Judiciary Act*. ALRC 89 did not consider amendments to the *Judiciary Act*.<sup>20</sup>

## **The federal judicial system**

### **Federal jurisdiction**

1.34 In each of the core areas identified, the Commission will investigate the appropriate principles for allocating and exercising federal jurisdiction. Federal jurisdiction refers to a court's authority to adjudicate the matters under Chapter III of the Constitution. In practice, this generally means the matters listed in the nine paragraphs of sections 75 and 76 of the Constitution, together with any claims that are inseparably linked with these matters.<sup>21</sup> Many of these paragraphs identify matters in which the Commonwealth, as a polity, has an undoubted interest, such as suits in which the Commonwealth is a party and prerogative relief against

<sup>20</sup> ALRC 89 referred to the *Judiciary Act* by way of background, in the context of the present distribution of federal jurisdiction (para 2.8); practice rules in federal courts and federal jurisdiction (para 5.16); federal government legal services directions and model litigant rules (para 8.49, 8.55, 12.239); and the remittal from the High Court of judicial review cases (para 10.3).

<sup>21</sup> These additional claims comprise a federal court's accrued or associated jurisdiction.

Commonwealth officers. Others are the result of unthinking copying from Article III of the United States Constitution and include matters that have often been said to be inappropriate or unnecessary in Australian circumstances, such as jurisdiction based on the ‘diversity’ of residence of the parties.

1.35 Section 75 of the Constitution states that the High Court has original jurisdiction in all matters

- (i) Arising under any treaty:
- (ii) Affecting consuls or other representatives of other countries:
- (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
- (iv) Between States, or between residents of different States, or between a State and a resident of another State:
- (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

1.36 Section 76 of the Constitution provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter

- (i) Arising under this Constitution, or involving its interpretation:
- (ii) Arising under any laws made by the Parliament:
- (iii) Of Admiralty and maritime jurisdiction:
- (iv) Relating to the same subject-matter claimed under the laws of different States.

1.37 As discussed later in this Discussion Paper, the Australian Constitution made two important departures from the United States model. First, s 77(iii) of the Constitution expressly confers power on the Commonwealth Parliament to invest state courts with federal jurisdiction. In the exercise of this power, since 1903, s 39 JA has invested broad federal jurisdiction on the various courts of the states. Second, s 73 of the Constitution extends the appellate jurisdiction of the High Court to all matters, whether or not they involve the exercise of federal jurisdiction. The general appellate jurisdiction of the High Court has enabled the Court to play a crucial role in developing a single common law for Australia, as well as determining other legal questions of public importance.

### **Federal courts**

1.38 Under the Constitution, Parliament may confer federal jurisdiction on both federal courts and state courts. The High Court of Australia, whose existence is contemplated by s 71 of the Constitution, was the first federal court to be established by legislation. Other federal courts were subsequently created in the specialised areas of bankruptcy and industrial relations,<sup>22</sup> but Parliament has used its power to create federal courts sparingly when compared with the practice in the United States. This remained the situation in Australia until the 1970s, when

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22 These were the Federal Court of Bankruptcy (established in 1930) and the Commonwealth Court of Conciliation and Arbitration (established in 1904 and subsequently reformed and renamed).

significant institutional reforms were made to the federal civil justice system. In 1975 the Family Court of Australia was established with jurisdiction in family law matters. In 1976 the Federal Court of Australia was established with a broader, but still specialised, jurisdiction in civil matters. In addition to acquiring the jurisdiction of the Federal Court of Bankruptcy and the Australian Industrial Court (as it was then known),<sup>23</sup> the new Court was given trade practices and the review of federal administrative action as its principal areas of jurisdiction.

1.39 The federal court system currently comprises the High Court, the Family Court (1975), the Federal Court (1976) and the Federal Magistrates Court (1999), which is also known as the Federal Magistrates Service.<sup>24</sup> The Industrial Relations Court of Australia was established in 1994 and continues to exist in a formal sense, but its jurisdiction was effectively transferred to the Federal Court in 1996.

1.40 The jurisdiction of all federal courts is defined in part by the Constitution and in part by federal legislation. This is quite explicit in the case of the High Court, part of whose jurisdiction is entrenched in s 75 of the Constitution. The High Court's original jurisdiction is supplemented by federal legislation that confers additional jurisdiction on the Court in s 76 matters.

1.41 In important respects, the jurisdiction of other federal courts is also defined by the Constitution. For example, the Constitution permits jurisdiction to be conferred on federal courts in relation to 'matters' and that term has been used to define the scope of the accrued jurisdiction of federal courts (see Chapter 2). Moreover, both the original and appellate jurisdiction of federal courts other than the High Court is confined to the types of matters enumerated in sections 75 and 76 of the Constitution.<sup>25</sup>

1.42 In most other respects, however, the jurisdiction of federal courts is defined by federal legislation.<sup>26</sup> In the case of the Family Court, jurisdiction is conferred by the *Family Law Act*, which is also the Act that establishes the Court. In the case of the Federal Court and the Federal Magistrates Court, the conferral of jurisdiction is achieved somewhat differently. The *Federal Court of Australia Act* does not itself confer jurisdiction on the Court established by that Act.<sup>27</sup> Rather, s 19(1) FCAA provides that the Court's jurisdiction is that 'vested in it by laws made by the Parliament'. Over time, a very substantial number of Acts have conferred jurisdiction on the Federal Court in relation to specific matters. The areas of trade

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23 *Federal Court of Australia (Consequential Provisions) Act 1976* (Cth), s 4.

24 s 8 FMA.

25 In the case of the High Court, original jurisdiction is confined to s 75 and s 76 matters but appellate jurisdiction extends under s 73 to the exercise of state jurisdiction.

26 An attempt to confer state jurisdiction on federal courts by means of state legislation was held invalid in *Re Wakim, ex parte McNally* (1999) 198 CLR 511.

27 A minor exception is s 32 FCAA, which confers 'associated jurisdiction' on the Court. See Ch 2.

practices, review of administrative action, migration, admiralty, bankruptcy and native title feature prominently among them.<sup>28</sup> In addition, in 1997 the Federal Court was given much broader federal civil jurisdiction by s 39B(1A) JA. Section 10(1) FMA mirrors the approach of s 19 FCAA in relation to the Federal Magistrates Court.

### **Sharing federal jurisdiction**

1.43 The federal judicial system has always relied heavily on the state court systems to exercise federal jurisdiction. The Constitution requires state courts to exercise the ‘judicial power of the Commonwealth’ irrespective of the states’ consent, to the extent that it is invested in them by Parliament. In the past 100 years, federal jurisdiction has grown with the ever-increasing spheres of activity regulated by federal legislation. The importance of state courts in the federal judicial system has in many respects increased with the growth in federal jurisdiction itself.

1.44 At the same time, the expansion of federal legislation has had a significant impact on the jurisdiction of the Federal Court. As discussed in Chapter 2, the Federal Court is no longer the ‘small’ specialised court envisaged when it was created in 1976. Indeed, the enactment in 1997 of s 39B(1A)(c) JA — giving the Federal Court jurisdiction in matters arising ‘under any laws made by Parliament’ — was passed by Parliament without so much as a ripple of controversy.

1.45 The maturation of the federal judicial system over the past 25 years has not taken place without debate regarding the allocation of jurisdiction among its component courts. At times, certain federal matters have been vested exclusively in federal courts, while others have been vested exclusively in state courts. But for the most part the allocation of federal jurisdiction between state and federal courts has been shared.

1.46 The scheme for cross-vesting jurisdiction between state, territory and federal courts has been one the most adventurous experiments in sharing jurisdiction between courts within the Australian judicial system.<sup>29</sup> When the scheme came into force in 1988, it enabled federal courts to exercise state jurisdiction, state courts to exercise federal jurisdiction, and state courts to exercise each others’ state jurisdiction. The invalidation of the first of these components by the High Court in 1999<sup>30</sup> impaired the full functioning of the scheme, although other components continue to operate.

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28 See Ch 2 for a complete list of statutes.

29 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and cognate state and territory legislation.

30 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.



## Judicial power in territory courts

1.47 The terms of reference specifically raise issues relating to the exercise of judicial power by courts of the territories, specifically the Northern Territory and the Australian Capital Territory.

1.48 The position of territory courts in the Australian judicial system has been controversial. For many years territory courts were regulated directly by Commonwealth laws enacted for the government of the territory pursuant to s 122 of the Constitution. When the Northern Territory and the Australian Capital Territory were granted self-government in 1978 and 1989 respectively, responsibility for the administration of their courts was substantially devolved to the new polities.

1.49 However, many difficulties have survived the transition to self-government. Three that require particular attention in this reference are

- ?? the extent to which the Commonwealth Parliament should continue to regulate the exercise of judicial power in the territories
- ?? the desirability of parity in the treatment of the Northern Territory and the Australian Capital Territory, especially given the latter's role as the seat of government,<sup>31</sup> and
- ?? the merits of assimilating the treatment of the territories to that of the states in relation to matters regulated by the *Judiciary Act*.

1.50 Some of these matters are issues of legislative policy and can be clarified by amendment to the *Judiciary Act*. Others hinge on constitutional questions that await further clarification by the High Court. A principal example of this, and one with significant consequences for the way in which federal legislation is framed, is the question whether, and in what circumstances, territory courts exercise federal jurisdiction.<sup>32</sup>

## Underlying issues

### Legislative power and its constitutional limitations

1.51 A primary concern underlying a review of the *Judiciary Act* is the role of the Constitution in shaping any program of legislative reform. The Constitution grants to the Commonwealth Parliament significant powers in respect of the judicature. These include powers to

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31 s 125 Australian Constitution.

32 See eg *Northern Territory v GPAO* (1999) 196 CLR 553.

- ?? create federal courts (s 71)
- ?? invest federal courts with original and appellate federal jurisdiction (s 77(i))
- ?? invest state courts with original and appellate federal jurisdiction (s 77(iii))
- ?? define the extent to which the jurisdiction of federal courts is exclusive of that of the states (s 77(ii))
- ?? prescribe 'exceptions' and 'regulations' to the right of appeal to the High Court (s 73)
- ?? confer rights to proceed against the Commonwealth or a state within the limits of the judicial power (s 78)
- ?? prescribe the number of judges required for the exercise of federal jurisdiction by any court (s 79)
- ?? provide for the exercise of judicial power in the territories (s 122), and
- ?? make laws with respect to matters incidental to the execution of any power vested by the Constitution in Parliament or the federal judicature (s 51(xxxix)).

1.52 The Constitution also imposes significant limitations on legislative power. Some of these are explicit, such as the preservation of a channel of appeal from state Supreme Courts to the High Court (s 73), or the subject matter of original jurisdiction that is conferred directly on the High Court by s 75. However, many other limitations have been crafted by the courts in response to their desire to maintain the separation of judicial power from other governmental powers, to preserve judicial independence, or to establish an appropriate balance between state and federal interests.

1.53 These limitations, which are implied from the structure and function of Chapter III, are the most difficult to accommodate in considering legislative reform because of the shifting boundaries of the law. In the context of this inquiry, this presents particular difficulties in respect of crown immunity (Chapter 5) and the jurisdiction of territory courts (Chapter 7). Proposals for legislative reform need to be sensitive to the direction in which the High Court's jurisprudence is moving, if that can be discerned. The risk of legislative misjudgment is that reforms may soon become unnecessary, undesirable or even unconstitutional.

1.54 While constitutional reforms are beyond the scope of this reference, virtually all aspects of this inquiry and the resulting recommendations must be made in the shadow of the Constitution and with sensitivity to the constitutional context in which the *Judiciary Act* and related legislation operate.

## Regulating federal courts or federal jurisdiction?

1.55 A further concern underlying many of the core areas of this inquiry is the question of how deeply federal law should penetrate the judicial systems of the states and territories. This issue arises because reforms might be applied either to all courts exercising federal jurisdiction (whether federal or state) or, more narrowly, to all federal courts.

1.56 Extensive use of the former possibility would invite the penetration of federal legislation into the heartland of the state court systems. It would also make the question whether a state court was exercising state or federal jurisdiction in a particular case of pre-eminent importance, compounding what Cowen and Zines have described as the ‘absurdity in a notion of separate channels of State and federal jurisdiction within the same single court system’.<sup>33</sup> This is the antithesis of the approach of the cross-vesting legislation, which — according to the Attorney-General of the day — sought to bring about a situation in which no court would have to determine whether it was exercising federal, state or territory jurisdiction.<sup>34</sup> Although this goal was never wholly achieved, it is an understandable response to the difficulty of determining when federal jurisdiction is being exercised.

1.57 As discussed in Chapter 2, there are constitutional limitations on the competence of Parliament to regulate how state courts exercise federal jurisdiction. The procedure of state courts may be regulated when exercising federal jurisdiction but the structure and organisation of state courts may not be altered by federal laws. For example, the High Court has held that state courts may be required to dispense with robes when exercising jurisdiction under federal family law, but they cannot be required to hear such matters in a closed court.<sup>35</sup> There are differences of opinion on these issues, which demonstrate ‘how difficult and elusive is the dividing line’,<sup>36</sup> between what can and what cannot be regulated by Parliament.

1.58 In addition to constitutional considerations, there are several practical difficulties, which suggest caution in placing too great an emphasis on whether or not a matter falls within federal jurisdiction.

?? Categories of jurisdiction create procedural hurdles that are distant from the substantive merits of a case. Emphasising the nature of the jurisdiction exercised by a court may lend disproportionate weight to the procedural aspects of a case.

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33 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 138.

34 *Hansard* (H of R) 22 October 1986, 2556.

35 *Russell v Russell* (1976) 134 CLR 495.

36 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, xiii.

- ?? The determination of whether a matter lies within state or federal jurisdiction may be highly technical. There appears to be a lack of detailed knowledge in the legal profession about the finer points of the distinction.<sup>37</sup> Consequently, cases may founder in the superior courts due to jurisdictional problems before the substantive issues can be aired.
- ?? There is a degree of unpredictability as to when a matter becomes federal in character. A matter that begins in state jurisdiction may be unexpectedly transformed into federal jurisdiction during the course of the hearing, for example, if a constitutional defence is raised in argument.<sup>38</sup>
- ?? There may be legal difficulties in determining the scope of federal jurisdiction where, for example, a federal claim is allied to a common law claim and the accrued jurisdiction of a federal court is consequently invoked. In such cases, the federal law may or may not be a colourable attempt to bring the case within the jurisdiction of a federal court.
- ?? There may be practical difficulties for state courts if they are required to switch between state and federal procedures according to whether they exercise state or federal jurisdiction.

1.59 On the other side of the argument, the extension of federal legislative reforms to all courts exercising federal jurisdiction would enable the Commonwealth Parliament to provide for the efficient administration of law and justice in the exercise of federal jurisdiction, while leaving it to the state parliaments to determine the best arrangements for the exercise of state judicial power. This view emphasises the fact that the Constitution authorises the federal legislature to conscript state courts for the exercise of federal judicial power. It also recognises the importance of uniformity in the exercise of this ‘national jurisdiction’ and the legitimacy of legislative attempts to make the exercise of that jurisdiction effective.

1.60 Some recent decisions of the High Court support a move towards recognising the national character of federal jurisdiction. In *Kable v Director of Public Prosecutions (NSW)*<sup>39</sup> a majority of the High Court relied on the circumstance that state courts are actual or potential recipients of federal jurisdiction to import certain safeguards into the functioning of the state court systems. As a result, state courts cannot perform functions that are incompatible with their role in exercising the judicial power of the Commonwealth. In coming to this view, Gaudron J emphasised that the Constitution ‘provides for an integrated

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37 W Gummow ‘Foreword’ in B Opeskin & F Wheeler (eds) *The Australian Federal Judicial System* Melbourne University Press Melbourne 2000, vi.

38 See, for example, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

39 *id.*

Australian judicial system for the exercise of the judicial power of the Commonwealth', and that uniformity was therefore necessary in the exercise of federal jurisdiction because the Constitution does not permit of different grades or qualities of justice.<sup>40</sup>

1.61 Gaudron J had espoused similar views in her earlier dissenting judgment in *Leeth v Commonwealth* stating that, when exercising federal jurisdiction, state courts, by necessary implication from the Constitution, 'have a role and existence which transcends their status as courts of the States'.<sup>41</sup> Her Honour noted that, while it may be understandable for some procedural differences to occur when state courts exercise federal jurisdiction, 'it is manifestly absurd that the legal consequences attaching to a breach of a law of the Commonwealth should vary merely on account of the location or venue of the court in which proceedings are brought'.<sup>42</sup> Deane and Toohey JJ on a different basis argued that as a result of the constitutional premise of equality it was impossible to countenance a situation in which Commonwealth law was applied differently and inconsistently by different courts in Australia.<sup>43</sup>

1.62 It is thus arguable that only an integrated judicial system with deep regulation of federal jurisdiction can meet national standards for quality, consistency and effectiveness. In such a system, the significance of a court exercising federal jurisdiction will be enhanced by federal regulation of some aspects of its operation. This is especially so in relation to substantive law, where arguments based on the 'rule of law' weigh heavily in favour of a uniform outcome irrespective of the particular jurisdiction in which a proceeding is brought. In matters of procedure the case for uniformity may be weaker. It may be argued, for example, that diverse procedural laws allow an opportunity for local experimentation without jeopardising substantive legal outcomes. Moreover, litigants and lawyers, who are predominantly state-based, are unlikely to be confused by procedural differences between jurisdictions.

1.63 Different contexts invite different responses to the question of the reach of federal laws regulating federal judicial power. For example, in its 1992 report on choice of law (ALRC 58), the Commission recommended the enactment of choice of law rules applicable in all courts exercising federal jurisdiction. This was to be supplemented by uniform state laws, which would provide identical choice of law rules in the exercise of state jurisdiction. By contrast, the Commission's reports on evidence in 1985 and 1987 recommended comprehensive legislation on evidence

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40 (1997) 189 CLR 51, 102 (Gaudron J). See also McHugh J (115) and Gummow J (142, 143).

41 (1992) 174 CLR 455, 498-499.

42 *ibid.*

43 *id.*, 490-491.

for all federal and territory courts.<sup>44</sup> If Australia-wide uniformity were to be achieved, this would be done by each state enacting a law in identical terms for all evidential matters arising in their courts, regardless of whether the matter was one of state or federal jurisdiction. While the means of achieving the goal of Australia-wide uniformity differed, both reports shared this goal.

## Overview of this paper

1.64 The subject matter of the reference can be conveniently divided into seven core areas, which are discussed in successive chapters of this Discussion Paper. These are

- ?? allocating original federal jurisdiction between federal and state courts
- ?? transferring proceedings between and within courts exercising federal jurisdiction
- ?? appellate jurisdiction of federal courts
- ?? claims against the Commonwealth
- ?? the law applicable in federal jurisdiction
- ?? judicial power in the territories, and
- ?? location, consolidation and simplification.

## Chapter 2 — Allocating original federal jurisdiction between federal and state courts

1.65 The power to allocate original federal jurisdiction between state and federal courts, conferred on Parliament by the Constitution, allows Parliament to determine what work federal and state courts do in respect of federal matters. Chapter 2 examines how such jurisdiction is allocated and why, including

- ?? general policies regarding the allocation of federal jurisdiction
- ?? the original jurisdiction of the High Court and the extent to which it should be able to adjudicate some federal matters exclusively
- ?? the original jurisdiction the Federal Court, its expansion over time, and the impact of this on state courts, and
- ?? the exercise of federal jurisdiction by state courts, the limits imposed by the Constitution and the *Judiciary Act* on the exercise of that jurisdiction, and the actual conferral of such jurisdiction by federal legislation.

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<sup>44</sup> Australian Law Reform Commission Report 26 *Evidence (Interim)* Sydney 1985 (ALRC 26); Australian Law Reform Commission Report 38 *Evidence* Sydney 1987 (ALRC 38).

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### **Chapter 3 — Transfer of proceedings between and within courts exercising federal jurisdiction**

1.66 This chapter considers the transfer of proceedings between and within courts exercising original federal jurisdiction and jurisdiction under Commonwealth laws. Several mechanisms for transfer are considered in detail in this chapter, namely

- ?? transfers within a court to bring about a change of venue
- ?? transfers within a court from a single judge to a Full Court by way of a case stated or question reserved
- ?? transfers between courts in the form of a case stated or question reserved
- ?? remittal of matters from one court to another court lower in the judicial hierarchy, and
- ?? removal of matters from one court to another court higher in the judicial hierarchy.

1.67 The chapter includes analysis of the transfer powers and the relevant procedural and policy issues associated with their exercise, particularly in relation to sections 78A and 78B JA.

### **Chapter 4 — Appellate jurisdiction of federal courts**

1.68 Appellate jurisdiction is a crucial feature of the allocation and exercise of federal civil jurisdiction. This chapter outlines the structure and aims of the federal appeals system, the different avenues of appeal to the High Court and other federal courts, and areas that might require reform. The chapter is divided into sections covering

- ?? the functions of appeals in correcting errors made at trial and in developing the law
- ?? the constitutional framework for the exercise of appellate jurisdiction by federal courts
- ?? avenues of appeal to the High Court, Federal Court and Family Court
- ?? cross-jurisdictional appeals, such as those brought from state Supreme Courts to the Federal Court, and from the Supreme Court of Nauru to the High Court
- ?? access to federal courts by way of first appeal and whether this should generally be as of right or by leave of the court
- ?? access to the High Court on a second appeal and the process of obtaining special leave
- ?? the exception to the High Court's special leave requirement in the case of appeals certified by the Family Court

- ?? the structure and composition of intermediate appellate courts, including the desirability of permanent or rotating appellate benches and variations to the number of judges sitting on appeals, and
- ?? proposals for establishment of a national appellate court for Australia.

## **Chapter 5 — Claims against the Commonwealth**

1.69 This chapter considers the procedural and substantive rights of parties in proceedings in which the Commonwealth is a defendant or in which a party seeks to enforce a law against the Commonwealth. Central to the discussion is a constellation of immunities that have been recognised by the common law as pertaining to the Crown, but which have been generally eroded over time. The chapter covers the following issues

- ?? history, policy arguments and legal developments regarding the Crown's immunity from being sued
- ?? the immunity of the Commonwealth from claims in tort and contract, the effect of sections 56, 58 and 64 JA in proceedings against the Commonwealth or a state, vicarious and direct tortious liability of the Commonwealth, the tort of administrative wrong, and the role of s 51(xxxi) of the Constitution
- ?? the immunity of the Crown from statute and the operation of s 64 JA
- ?? the constitutional validity of state statutes that purport to bind the Commonwealth, in the light of *Re Residential Tenancies Tribunal of NSW and Henderson; Ex parte Defence Housing Authority*<sup>45</sup>
- ?? the immunity of the Crown from execution of judgments against it, and the Commonwealth's statutory obligation to satisfy judgment debts, and
- ?? the overarching question of 'who is the Commonwealth' and the extent to which the 'shield of the Crown' extends to an array of Commonwealth entities.

## **Chapter 6 ? The law applicable in federal jurisdiction**

1.70 This chapter considers the problems that arise when courts must apply procedural or substantive laws of a state or territory in the course of proceedings in federal jurisdiction, in the absence of federal laws governing the matter at hand. This chapter covers

- ?? the nature of choice of law and the distinct problems that arise in determining the applicable law in a federal system
- ?? the power of Parliament to stipulate the substantive law, procedural law and choice of law rules applicable by courts exercising federal jurisdiction

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45 (1997) 190 CLR 410.



- ?? the interpretation of sections 79 and 80 JA, and the relationship between the sections, and
- ?? choice of law in proceedings against the Commonwealth and the operation of sections 56 and 64 JA in this context.

## **Chapter 7 — Judicial power in the territories**

1.71 This chapter is directed towards the complex issues that relate to the nature of judicial power in Commonwealth territories and the relative merits of legislative regimes governing the Australian Capital Territory and Northern Territory. This chapter considers

- ?? the arrangements made for the exercise of judicial power in the Northern Territory and the Australian Capital Territory
- ?? the policy issues arising from the way in which states and territories exercise the judicial power of the Commonwealth and the degree to which there should be equality between them
- ?? the background to Part IXA JA in its application to the Northern Territory and its relevance to the Australian Capital Territory
- ?? the immunity of a territory from execution of a judgment against it pursuant to s 67E JA
- ?? the scope of the Federal Court’s jurisdiction with respect to matters arising under the common law applicable in the territories, and
- ?? channels of appeal from trial decisions of territory courts to intermediate appellate courts and courts of final appeal.

## **Chapter 8 — Location, consolidation and simplification**

1.72 This chapter considers the location, consolidation and simplification of provisions in the *Judiciary Act*, such as whether there are certain provisions that ought to be relocated in other legislation, or repealed altogether. This aspect of the inquiry goes beyond an assessment of those provisions of the *Judiciary Act* considered elsewhere in the paper and addresses general questions of the structure of this Act and related Acts. In the course of this discussion, the chapter looks at

- ?? criteria for locating provisions, the objects of the *Judiciary Act* and its present structure
- ?? the possibility of renaming the Act and removing obsolete provisions
- ?? the desirability of relocating jurisdictional provisions to the legislation establishing the relevant Court, and
- ?? the desirability of relocating portions of the *Judiciary Act*, such as Part VIIIB (Australian Government Solicitor) and Part VIIC (Attorney-General’s legal services directions), to new Acts.

## **The process of reform**

1.73 Early in the course of the reference, the Commission formed an Advisory Committee of experts to assist it in defining the scope of the inquiry, as well as to provide advice over the course of the reference. The members of the Committee include past and present members of the judiciary, legal practitioners, government lawyers and academics. The first meeting of the Advisory Committee was held in March 2000, and the Committee will meet as necessary prior to the preparation of the final report. A list of Advisory Committee members is reproduced above at page 10.

1.74 Members of the Advisory Committee were forwarded draft chapters of this Discussion Paper. The Commission continues to derive considerable assistance from the comments of the Advisory Committee and extends particular gratitude to its members.

1.75 The Commission has also begun to consult more widely with courts, legal professional associations, private practitioners, government lawyers, community and business groups, government agencies and departments, and academics. The Commission has already received a number of submissions and expressions of interest in respect of this inquiry. However, the bulk of the Commission's consultations will take place following the release of this Discussion Paper. A complete list of submissions will be provided in the final report.

## **How you can help**

1.76 Responses to this Discussion Paper will assist the Commission in preparing its recommendations. The Commission welcomes the views and comments of any person or organisation interested in the issues raised in this Discussion Paper. Information about making a submission or about other aspects of the reference is available directly from the Commission or from its website.<sup>46</sup> The deadline for submissions is **16 March 2001**. The Commission would appreciate written submissions being provided in electronic format as well, if possible.

1.77 Prior to presenting its final report, the Commission will continue its extensive consultations with courts, government, the legal profession and others with a special interest in the exercise of the judicial power of the Commonwealth.

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46 <http://www.alrc.gov.au>.

## 2. Allocating original federal jurisdiction between federal and state courts

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### Introduction

2.1 Under the Australian Constitution federal, state and territory courts may exercise the judicial power of the Commonwealth. This Chapter examines how and why original jurisdiction is allocated between state and federal courts. The exercise of jurisdiction by territory courts is examined in Chapter 7. The exercise of appellate original jurisdiction is examined in Chapter 4.

2.2 Original jurisdiction refers to the power of a court to adjudicate a matter at first instance, including the right to inquire into and grant relief in respect of any part of the matter.<sup>1</sup> Appellate jurisdiction refers to the power of a court to review, by way of appeal, a judgment given in the exercise of original jurisdiction.

2.3 Although original jurisdiction is commonly exercised by a single judge and appellate jurisdiction by a panel of judges, there is no necessary correlation between the type of jurisdiction and the number of judges who exercise it. Some of the most important constitutional cases, which are decided by a Full Court of seven High Court justices, come to that Court in its original jurisdiction.<sup>2</sup> Conversely, there is no constitutional impediment to appellate jurisdiction being exercised by a small complement of judges, or even a single judge alone.<sup>3</sup> It is noteworthy, for example,

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1 R Lumb & G Moens *The Constitution of the Commonwealth of Australia Annotated* 5<sup>th</sup> ed Butterworths Sydney 1995, para 580.

2 Pursuant to s 76(i) of the Constitution.

3 Section 78 of the Constitution expressly empowers the Parliament to prescribe the number of judges who exercise federal jurisdiction in any court.

that in the United Kingdom a recent report on reform of the Court of Appeal has recommended that there should be a discretion to list appeals before a single member of the Court of Appeal in suitable civil cases.<sup>4</sup>

2.4 Parliament's power to allocate original federal jurisdiction between state and federal courts gives it considerable sway in determining the contours of the federal judicial system. This Chapter examines the question of allocation in five sections. The first examines the policies that should inform this choice. The second, third and fourth sections consider the impact of the allocation of jurisdiction on the work of the High Court, the Federal Court and the Family Court, respectively. The fifth section considers the conferral of federal jurisdiction on state courts.

## **Underlying policies**

2.5 The contours of the federal judicial system have changed substantially since federation in 1901. In civil matters, the reliance that was initially placed on state courts exercising federal jurisdiction has changed as new federal courts have been created and as their jurisdiction has expanded. These changes have been incremental but they suggest a changing view of the policies underlying the allocation of federal jurisdiction between state and federal courts.

2.6 It has been said that until the 1970s Parliament did not proceed on any set principles in allocating federal jurisdiction and that legislation apportioning federal jurisdiction reflected ad hoc decisions made without any real thought being given to the problem.<sup>5</sup> However, the establishment of two new federal courts in the 1970s — the Family Court in 1975 and the Federal Court in 1976 — brought a new focus to the policies underlying the jurisdictional relationship between state and federal courts.

2.7 When legislation establishing the Federal Court was introduced into the House of Representatives in 1976, the Attorney-General of the day, Mr Ellicott, stated that

[t]he government believes that only where there are special policy or perhaps historical reasons for doing so should original federal jurisdiction be vested in a federal court.<sup>6</sup>

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4 J Bowman et al *Review of the Court of Appeal (Civil Division): Report to the Lord Chancellor* 1997 Lord Chancellor's Department London, 56–7.

5 M Byers & P Toose 'The Necessity for a New Federal Court: A Survey of the Federal Court System in Australia' (1963) 36 *Australian Law Journal* 308, 309.

6 *Hansard* (H of R) 21 October 1976, 2111.

2.8 The Attorney-General went on to name industrial law, bankruptcy, trade practices and judicial review of federal administrative action as appropriate subject areas for the jurisdiction of a federal court. Nearly 25 years later, the expansion of the jurisdiction of federal courts suggests that special policy or historical reasons no longer account fully for the conferral of federal jurisdiction on federal courts. This section briefly examines the policies that might be thought relevant to the allocation of federal jurisdiction within the federal judicial system.<sup>7</sup>

### A special role for the highest court

2.9 Whatever the policies underlying the conferral of jurisdiction on other federal courts, it is clear that the High Court of Australia is in a special position. As the highest court in the Australian judicial system, it is clear that its limited time and resources should be directed towards deciding the most important cases, whether they relate to matters of general law or constitutional law.

2.10 The role of Parliament in relation to the High Court's original jurisdiction has generally been limited to conferring additional jurisdiction on the High Court in matters listed in s 76 of the Constitution. As described later in this Chapter (see paragraph 2.59), the High Court at one time bore a considerable burden of original jurisdiction under an assortment of federal statutes. In the view of Sir Garfield Barwick, much of this work impeded the central role of the Court as interpreter of the Constitution and final court of general appeal.<sup>8</sup> Since 1976, Parliament has done much to reform the High Court's original jurisdiction and to relieve the Court of its excessive workload. These reforms recognise the special position of the High Court as the 'keystone of the federal arch',<sup>9</sup> and this remains an important consideration in allocating original jurisdiction today.

### Uniform interpretation of federal law

2.11 A second policy to consider in allocating original jurisdiction is the desire for uniformity in the interpretation of federal law. It might be argued, for example, that a federal court with national operation is able to attain a degree of uniformity in the interpretation of federal law, which state courts interpreting the same laws are unable to achieve.<sup>10</sup> This concern appears to have motivated the conferral of original

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7 This section draws on B Opeskin 'Federal jurisdiction in Australian courts: Policies and prospects' (1995) 46 *South Carolina Law Review* 765.

8 G Barwick, 'Address to the National Press Club' (1976) 50 *Australian Law Journal* 433.

9 This was the description given to the Court by the Attorney-General, Alfred Deakin, when sponsoring the Judiciary Bill. See *Hansard* (H of R) 18 March 1902, 10 967.

10 This was the view of the founders of the United States Constitution. See Alexander Hamilton, *The Federalist*, No 80.

jurisdiction on federal courts in a number of areas, including trade practices, in the 1970s.<sup>11</sup>

2.12 The assumption that uniform interpretation of federal law is best achieved through a national court has not gone unchallenged. The assumption appears to rest on two claims. The first is that there is greater comity between trial judges within a single federal court than between trial judges exercising federal jurisdiction in disparate state courts. The second is that channels of appeal are more effective in ensuring uniformity of interpretation within a national court.

2.13 In relation to the former claim, many state court judges have argued that judicial comity goes a substantial way to ensuring consistency between state courts exercising federal jurisdiction. The following comment of Street CJ in the New South Wales Court of Criminal Appeal summarises this position.

Despite the forebodings of the prophets of doom to the effect that the existing state court system is less than appropriate to furnish the forum for construing Commonwealth legislation, the suggestion being that inconsistent views between the states will lead to inconsistencies in the administration of the law, I have no difficulty whatever in perceiving that the doctrine of precedent is fully adequate to cope with these risks. As a matter of precedent this Court is not, of course, bound by the decision of the Full Court of Victoria. But I have not the slightest doubt that, where a Commonwealth statute has been construed by the ultimate appellate court within any state or territory, that construction should, as a matter of ordinary practice, be accepted and applied by the courts of other states and territories so long as it is permitted to stand unchanged either by the court of origin or by the High Court. The risk of differing interpretations amongst the states is thus negated and, in practical terms, a uniform application of Commonwealth laws throughout Australia is assured.<sup>12</sup>

2.14 The position of trial judges within a federal court appears to differ little from that described by Street CJ. A single judge of a federal court is not bound to follow a decision of another judge of the same court, although clearly deference would be shown to an earlier decision. From the viewpoint of achieving uniformity in the interpretation of federal law, there is arguably little basis for preferring federal courts to state courts solely on the basis of judicial comity. Ultimately, however, the claim regarding comity in state and federal courts is an empirical one which is difficult to verify.

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11 *Hansard* (H of R), 16 July, 1974, 234.

12 *R v Abbrederis* [1981] 1 NSWLR 530, 542. See also *R v Parsons* [1983] 2 VR 499; *R v Yates* (1991) 102 ALR 673, 679–680; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

2.15 The other claim, which relates to the role of appeals, is also a disputed basis for conferring original jurisdiction on federal courts for the purpose of achieving uniform interpretation of federal law. In the first place, the general appellate jurisdiction of the High Court ensures reasonable uniformity of judge-made law in Australia, irrespective of how original jurisdiction is allocated between state and federal courts. One of the grounds on which the High Court may grant special leave to appeal under s 35A JA is that its decision as the final appellate court ‘is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law’.

2.16 Additionally, the avenues available for intermediate appeals may facilitate uniform interpretation of federal law, regardless of how original jurisdiction has been allocated. For example, it is possible to give a federal court exclusive jurisdiction to hear appeals from decisions of state courts in matters of federal jurisdiction. This approach has been adopted since the 1980s with respect to intellectual property matters (see Chapter 4). In this example, federal legislation ensures that state appellate courts cannot act as the final arbiters of the meaning of the relevant legislation, and that all appeals are determined in a federal court.<sup>13</sup> In this way, an intermediate appellate court may bring uniform interpretation to an area of federal law notwithstanding that original jurisdiction is invested in state courts.

### Intermingled jurisdiction

2.17 A further policy consideration of a practical nature concerns the ease with which disputes may raise a combination of state and federal issues, the relative importance of which may change significantly during the course of litigation. Most systems of pleadings in state courts focus on the need to identify relevant facts. Although the relevant legal principles or statutes may also be identified at this stage, it is generally not until the facts are found that it is possible to ascertain precisely which legal principles are relevant to the disposition of the matter.

2.18 For this reason, it is common for matters in state courts to appear to involve questions of federal jurisdiction, based on an inspection of the pleadings, but for the court not be required to determine any issue of federal law once the relevant facts have been established. A typical example is a claim in contract, tort or equity, which contains a claim in the alternative for relief pursuant to the *Trade Practices Act 1974* (Cth) (*Trade Practices Act*), often in relation to deceptive and misleading conduct (s 52). In many such cases, resolution of the facts will mean that the

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<sup>13</sup> *Trade Marks Act 1955* (Cth) s 114; *Patents Act 1952* (Cth) s 148; *Patents Act 1990* (Cth) s 158; *Designs Act 1906* (Cth) s 40I; *Copyright Act 1968* (Cth) s 131B, 248L. The merits of such cross-jurisdictional appeals is considered in Ch 4.

common law claim is successful and the *Trade Practices Act* claim is not pursued. It is also common for an ordinary common law claim to be coloured at some stage of the proceedings by a federal issue, for example, under the *Insurance Act 1973* (Cth), the *Bankruptcy Act 1966* (Cth) or the *Trade Practices Act*. In many cases, these federal issues are subsequently amended or withdrawn.

2.19 These practical considerations have significant policy implications. One implication is that, if federal jurisdiction is made exclusive to federal courts, then federal courts will in some circumstances end up determining matters that have no federal law component at all. This is because the doctrine of accrued jurisdiction entitles a federal court to adjudicate both federal claims and related claims that would otherwise be non-federal. The court's jurisdiction over the accrued 'non-federal' portion of the matter persists even though the federal claim is later abandoned or dismissed. Rigid divisions between state and federal jurisdiction may therefore be impractical and inconvenient.

### **Specialisation**

2.20 A persuasive argument for conferring federal jurisdiction on federal courts is that it enables specialist expertise to be developed by judges in respect of the particular subject areas entrusted to them. This factor has been an important determinant of the Australian federal judicial system, where federal courts established by Parliament (other than the High Court) have tended to be specialised. The states have also brought about a proliferation of specialised courts and tribunals, but the state Supreme Courts are, and have always been, courts of general jurisdiction. For this reason, judges of the Supreme Courts may have only occasional contact with a particular area of federal law.

2.21 The specialisation of Australian federal courts is readily apparent in relation to the Family Court, which exercises jurisdiction in family law, and in the new Federal Magistrates Court, which is intended to hear less complex family law and bankruptcy matters. Until recently, the Federal Court might also have been regarded as having specialised jurisdiction. Despite the fact that jurisdiction is conferred on the Federal Court by as many as 149 federal Acts, the vast majority of the Court's original jurisdiction is concerned with discrete areas of federal law, namely, trade practices, taxation, administrative review, admiralty and bankruptcy. However, the enactment of s 39B(1A) JA has called this specialisation into question (see paragraphs 2.125, 2.141–2.152).

2.22 Reinforcing the specialisation and expertise of federal judges is the fact that many judges hold commissions or appointments on related tribunals and bodies. Several judges of the Federal Court, for example, hold commissions on the



Administrative Appeals Tribunal, the Australian Competition Tribunal, the National Native Title Tribunal, the Australian Industrial Relations Commission, or the Copyright Tribunal. In some instances the legislation establishing the tribunal requires one or more of its members to be a judge of a federal court.<sup>14</sup> Many judges also spend a significant amount of time on other activities related to law, which enhances the breadth of their experience and informs their work as federal judges. Examples include membership of the Admiralty Rules Committee and the Commonwealth Evidence Act Advisory Committee.<sup>15</sup>

2.23 Despite its advantages, specialisation is not always considered to be a benefit of conferring jurisdiction on federal courts. For example, it has been said that the specialised and limited nature of some federal work, such as family law, has had a deleterious effect on the quality of judicial appointments because the work does not always attract lawyers of the highest calibre.<sup>16</sup> Moreover, specialisation may remove judges from experience of local matters, and distance them from the community.<sup>17</sup> Finally, it may be argued that specialisation is only a relevant consideration where matters are likely to arise as discrete actions and not be intermingled with other claims, such as those arising in accrued jurisdiction.

## Federalism

2.24 A highly disputed question concerning the allocation of federal jurisdiction between state and federal courts is whether the principle of federalism requires a federal-state division of power in the judicial branch of government, as in the legislative and executive branches. It has been argued that, for reasons of accountability, federal judges should interpret federal laws. In the words of EG Whitlam,

[j]udges who are called on to interpret and apply statutes should be appointed by governments responsible to the Parliaments which passed those statutes. On this basic principle alone ... federal laws should primarily be applied and interpreted by judges appointed by the federal government.<sup>18</sup>

14 *Trade Practices Act 1974* (Cth) s 31 (presidential members of the Australian Competition Tribunal); *Administrative Appeals Tribunal Act 1975* (Cth) s 7 (President of the Administrative Appeals Tribunal); *Copyright Act 1968* (Cth) s 140 (President of the Copyright Tribunal); *Native Title Act 1993* (Cth) s 110 (President of National Native Title Tribunal).

15 Federal Court of Australia *Annual report 1999–2000*, 2–6.

16 H Gibbs 'The state of the Australian judiciary' (1985) *Australian Law Journal* 522.

17 R McCallum 'A modern renaissance: Industrial law and relations under federal wigs 1977–1992' (1992) 14 *Sydney Law Review* 401, 429–431.

18 Commenting on M Byers & P Toose 'The necessity for a new Federal Court: A survey of the federal court system in Australia' (1963) 36 *Australian Law Journal* 308, 327.

2.25 On the other hand, Sir Owen Dixon claimed that ‘neither from the point of view of juristic principle nor from that of the practical and efficient administration of justice can the division of the Courts into state and federal be regarded as sound’.<sup>19</sup> In his view, courts should be established as an independent organ that is neither Commonwealth nor state. If established by the Constitution, courts of justice would have responsibility for administering the entire body of law, independently of the political arms of government, and free of the ‘extraordinary conception’ of federal jurisdiction. The essence of this view is that the courts are not akin to other arms of government.

2.26 This difference of opinion was replicated in the views of the Advisory Committee on the Australian Judicial System, in its report to the Constitutional Commission in 1987.<sup>20</sup> A majority of the Committee advocated the retention of separate state and federal courts. For two members of that majority, this was because of the importance of having a single executive and parliament able to accept political responsibility for the courts and their administration. In their view, the adoption of an integrated court system, which was neither federal nor state, would produce the inevitable result of responsibility for the courts being divided between the Commonwealth, state and territory governments, with the consequent difficulties regarding appointment and removal of judges, resourcing, and so on. A minority took the view that, while it was necessary for government to have responsibility for the courts, it was not an essential attribute of federalism for each government to have its own courts. The Constitutional Commission supported the majority’s view and recommended against the establishment of an integrated court system.<sup>21</sup>

2.27 The relationship between the judicial branch of government and other branches is an important policy consideration in allocating original jurisdiction between state and federal courts. If the Commonwealth Parliament enacts new laws, it is arguable that it should take responsibility for administering those laws by providing adequate resources for their interpretation and enforcement. However, Parliament’s ability to bear responsibility might be limited when federal jurisdiction is invested in state courts. The reason for this is that when Parliament confers federal jurisdiction on state courts it must generally take those courts as it finds them; the structure and organisation of state courts cannot be changed (see paragraphs 2.190–2.197). Where state courts are under-resourced and are burdened with a crowded docket, the Commonwealth Parliament may be unable to guarantee the efficient administration of federal laws if federal jurisdiction is invested in the state courts. This problem might be ameliorated by providing tied federal funding to

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19 O Dixon ‘The law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 606.

20 Advisory Committee on the Australian Judicial System *Report* Canberra 1987.

21 Constitutional Commission *Final Report* Canberra 1988 vol 1, para 6.16.

the state court,<sup>22</sup> but day-to-day administration of a state court's caseload would still lie outside the control of federal administration.

## **Efficacy**

2.28 An additional consideration in allocating federal jurisdiction is the efficacy of the court's processes and orders. It has been said of the Federal Court that 'the national character of the jurisdiction and the convenience of a court not limited by state boundaries make it appropriate to vest jurisdiction in such a court'.<sup>23</sup>

2.29 Federal courts enjoy the benefit of nationwide jurisdiction over defendants and ready enforcement of judgments throughout Australia. For example, s 18 FCAA provides that '[t]he process of the Court runs, and the judgments of the Court have effect and may be executed throughout Australia and the territories'. Legislation establishing other federal courts makes similar provision.<sup>24</sup>

2.30 However, any comparative advantage that federal courts once possessed in this regard has been largely eroded by federal legislation. The *Service and Execution of Process Act 1992* (Cth) establishes a nationwide scheme for the service of process and execution of judgments of state courts and goes a long way towards converting Australia into a single jurisdiction for the purpose of the service and execution of court process. In relation to service, s 15 of the Act provides that an initiating process issued in one state may be served in another state. In relation to judgments, s 105 provides a simple method of enforcement through a process of registration. A judgment rendered by one state court may be registered in a court of another state, and it then has the same force and effect as if the judgment had been given by the registering court. In addition to the legal regime, practical advances such as the development of video-link evidence further erode the practical distinction between federal and state courts based on territorial considerations.

## **Historical considerations**

2.31 As noted above, the Attorney-General, Mr Ellicott, when introducing legislation to establish the Federal Court in 1976 remarked that there might be historical reasons for conferring federal jurisdiction on federal courts rather than state courts (see paragraphs 2.7–2.8). The force of history has been influential in keeping industrial matters and bankruptcy matters within federal courts from a

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22 s 96 Australian Constitution.

23 P Durack 'The special role of the Federal Court of Australia' (1981) 55 *Australian Law Journal* 778, 779.

24 s 25 JA; s 10(3) FMA.

relatively early stage. That factor alone would appear to make it more likely that jurisdiction in these fields will remain with federal courts.

2.32 Jurisdiction in matters of federal industrial law has been exercised by federal courts since 1904, when the Commonwealth Court of Conciliation and Arbitration was established.<sup>25</sup> The reason for this institutional development can be traced to the protracted labour disputes of the 1890s and the belief that industrial peace could be better secured under the auspices of a specialised labour court.<sup>26</sup> Since then, the specialised labour court has undergone many reforms, including its abolition and recreation on several occasions, but the jurisdiction has always remained in the realm of federal courts.

2.33 Jurisdiction under the first federal law on bankruptcy, the *Bankruptcy Act 1924* (Cth), was initially exercised entirely by state courts. However, with the arrival of the Great Depression in the late 1920s, the amount of bankruptcy work escalated to the point where state court judges in New South Wales and Victoria could not deal with the volume of work.<sup>27</sup> Following representations from the state governments, the federal Parliament established the Federal Court of Bankruptcy in 1930.<sup>28</sup> In practice this newly established federal court exercised jurisdiction only in New South Wales and Victoria, where there had been serious court congestion. In other states, federal bankruptcy jurisdiction continued to be exercised by state courts authorised for that purpose. When the Federal Court was created in 1976, the jurisdiction of the Federal Court of Bankruptcy was transferred to the Federal Court, and the old Court was abolished.<sup>29</sup> Today, only the Federal Court and the Federal Magistrates Court exercise jurisdiction in bankruptcy.<sup>30</sup>

**Question 2.1.** How should the allocation of original federal jurisdiction between federal and state courts be influenced by considerations of the position of the court within the judicial hierarchy, uniformity of federal law, specialisation, federalism, efficacy of court orders or the historical allocation of jurisdiction?

## Original jurisdiction of the High Court

<sup>25</sup> *Commonwealth Conciliation and Arbitration Act 1904* (Cth).

<sup>26</sup> R McCallum & M Crock 'Australia's federal courts: Their origins, structure and jurisdiction' (1995) 46 *South Carolina Law Review* 719, 736–7.

<sup>27</sup> *Hansard* (H of R) 22 May 1930, 2 045–2 046.

<sup>28</sup> *Bankruptcy Act 1930* (Cth) s 4.

<sup>29</sup> *Bankruptcy Amendment Act 1976* (Cth) s 8.

<sup>30</sup> *Bankruptcy Act 1966* (Cth) s 27, as amended by the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth), sch 7.

2.34 Since the abolition of appeals from Australian courts to the Privy Council in 1986,<sup>31</sup> the High Court stands alone at the apex of the Australian judicial hierarchy. In that role, the High Court exercises a general appellate jurisdiction in all matters, whether state, territory or federal in origin (see Chapter 4). In addition to its appellate jurisdiction, the High Court has a substantial original jurisdiction which derives from sections 75 and 76 of the Constitution. Cases heard in that capacity account for a significant portion of the High Court's workload, including its function as the final arbiter of the meaning of the Australian Constitution.

### **Constitutional sources of original jurisdiction**

2.35 Section 75 of the Constitution states that the High Court has original jurisdiction in all matters

- (i) Arising under any treaty:
- (ii) Affecting consuls or other representatives of other countries:
- (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
- (iv) Between states, or between residents of different states, or between a state and a resident of another state:
- (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

2.36 Section 76 of the Constitution provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter

- (i) Arising under this Constitution, or involving its interpretation:
- (ii) Arising under any laws made by the Parliament:
- (iii) Of Admiralty and maritime jurisdiction:
- (iv) Relating to the same subject-matter claimed under the laws of different states.

2.37 Both sections 75 and 76 confer jurisdiction on the Court in respect of 'matters', but there are significant differences between the two sections. The Court's jurisdiction under s 75 is actual in the sense that it is conferred on the High Court by the Constitution itself and cannot be withdrawn by the Parliament except by constitutional amendment pursuant to s 128. By contrast, the jurisdiction under s 76 is potential because the Constitution does not confer it upon the High Court but merely empowers the Parliament to do so. Until Parliament acts, the High Court does not have the jurisdiction and once it has been conferred by Parliament it can later be repealed.

2.38 Together, sections 75 and 76 define an extensive original jurisdiction for the High Court — so much so that Cowen and Zines have suggested that if the Court's

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31 *Australia Act 1986 (Cth)*, *Australia Act 1986 (Imp)*.

original jurisdiction ‘were invoked to the full, it would impose an intolerable burden on the court’.<sup>32</sup> While Parliament cannot eliminate the original jurisdiction conferred on the High Court by s 75, in practice it has devised mechanisms to reduce the impact of unwanted original jurisdiction. For example, the Court’s power to remit matters under s 44 JA has enabled it to remove from its workload at least some matters in its original jurisdiction that are unsuitable for its adjudication as the highest court (see Chapter 3).

2.39 The provision of original federal jurisdiction in sections 75 and 76 was heavily influenced by Article III of the United States Constitution.<sup>33</sup> However, there are significant constitutional differences between the United States and Australia. In particular, the High Court has a general appellate jurisdiction, which is not confined to federal matters, and state courts in Australia may be conscripted by Commonwealth Parliament to exercise federal jurisdiction. Cowen and Zines have commented that, having regard to those constitutional differences, there was little need for an extensive original jurisdiction for the High Court.<sup>34</sup> Nonetheless, the Australian Constitution does confer an extensive federal jurisdiction on the High Court.

2.40 The various paragraphs of sections 75 and 76 specify an odd assortment of federal matters. Some matters are included because of their subject matter, some focus on the identity or residence of a party or parties, while s 75(v) focuses on the form of relief in relation to a particular party. Where matters turn on the identity or residence of a party, it is clear that the jurisdiction is federal whatever the subject matter of the proceedings.<sup>35</sup>

2.41 In practical terms many of the paragraphs of sections 75 and 76 are seldom utilised. This is particularly so of s 75(i) (matters arising under any treaty), s 75(ii) (matters affecting consuls), s 76(iii) (admiralty), and s 76(iv) (matters relating to the same subject matter claimed under the laws of different states). Sir Anthony Mason has noted that the great bulk of the High Court’s original jurisdiction has in fact consisted of matters arising under sections 75(v) and (iii), and 76(i) and (ii).<sup>36</sup>

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32 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 4.

33 id, 1–4; L Zines ‘Federal, associated and accrued jurisdiction’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 265.

34 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 3.

35 Advisory Committee on the Australian Judicial System *Report* Commonwealth of Australia Canberra 1987, para 3.17–18.

36 A Mason ‘The evolving role and function of the High Court of Australia’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 105.

2.42 The failure of the matters enumerated in sections 75 and 76 to correspond with a modern conception of what is appropriate for the nation's highest court has led to calls for constitutional change.<sup>37</sup> However, as explained in Chapter 1 of this Discussion Paper, the Commission is not considering making recommendations that would require amendment to the Constitution. The principal purpose of the discussion of the High Court's original jurisdiction is to examine those aspects of the Court's original jurisdiction that are amenable to legislative reform.

2.43 Accordingly, this section considers the High Court's original jurisdiction from the perspective of the *Judiciary Act*, and related legislation. The section considers the Court's constitutional jurisdiction under s 76(i) of the Constitution; its jurisdiction in matters arising under laws made by Parliament (s 76(ii)); and the extent to which the Court's original jurisdiction should be made exclusive of that of the states.

### **Matters arising under the Constitution — section 76(i) of the Constitution**

2.44 As noted above, Parliament has a discretion as to which matters listed in s 76 of the Constitution are suitable for conferral on the High Court. Since 1903, s 30 JA has conferred original jurisdiction on the High Court in s 76(i) matters, namely, matters 'arising under this Constitution, or involving its interpretation.' As Lane has commented, s 30(a) JA 'fully implemented' s 76(i) of the Constitution because the phrase in s 30(a) repeats the words of s 76(i).<sup>38</sup>

2.45 Section 76(i) may be seen as comprising two parts — matters arising under the Constitution, and matters involving the interpretation of the Constitution. The High Court has interpreted each phrase separately. In *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Barrett*, Latham CJ said

[T]he terms of para 1 [of s 76] show that a matter may arise under the Constitution without involving its interpretation, and that a case may involve the interpretation of the Constitution without arising under the Constitution.<sup>39</sup>

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37 See Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, ch 1; Australian Constitutional Convention *Minutes and proceedings of Debates of the Standing Committee* Perth 26–28 July 1978 AGPS Canberra 1978; Advisory Committee on the Australian Judicial System *Report* Commonwealth of Australia Canberra 1987, para 4.1–4.19.

38 P Lane *Lane's Commentary on the Australian Constitution* 2<sup>nd</sup> ed LBC Information Services North Ryde 1997, 597.

39 (1945) 70 CLR 141, 154.

2.46 Although the High Court has said that a matter involves the interpretation of the Constitution only when the constitutional issue is necessarily and directly raised,<sup>40</sup> the Court has nonetheless interpreted that term quite widely. For example, many disputes involving an alleged inconsistency between state and federal law under s 109 of the Constitution have been regarded as involving the interpretation of the Constitution pursuant to s 76(i).<sup>41</sup>

2.47 Most observers of the judicial system would regard constitutional adjudication as one of the most important tasks of the High Court. It is an odd fact of history, therefore, that a jurisdiction now regarded as essential to the role and function of the High Court should not be listed in the Court's entrenched jurisdiction under s 75 of the Constitution — rather, conferral of that jurisdiction on the High Court is at the discretion of Parliament.

2.48 The High Court's constitutional role could presumably be diminished by amendment to s 30(a) JA unless it could be said that the Constitution impliedly prohibits that course. However, that role is now so widely accepted that the Commission does not propose to examine any proposal for the diminution of the High Court's role in constitutional adjudication.

2.49 The converse question is whether the Court's constitutional jurisdiction ought to be enhanced by making it *exclusive* to the High Court, in the exercise of the powers conferred on Parliament by s 77(ii) of the Constitution. In Australia, constitutional adjudication is decentralised — generally speaking, any Australian court may pronounce on the constitutional validity of federal legislation when the issue arises in the course of litigation. The decentralised model is found in many of the United Kingdom's former colonies, including the United States, Canada and India.<sup>42</sup> In many European countries, by contrast, the task of constitutional adjudication is centralised in a constitutional court. Examples of centralised models include Germany, Italy, Spain and Austria.<sup>43</sup>

2.50 Cappelletti has suggested that the rationale of a decentralised system is that any judge may be faced with the question whether ordinary legislative norms conflict with the Constitution.<sup>44</sup> On the other hand, in Cappelletti's view, a centralised system of constitutional adjudication reflects the tradition of civil law countries,

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40 *James v South Australia* (1929) 40 CLR 1, 40.

41 P Lane *Lane's Commentary on the Australian Constitution* 2<sup>nd</sup> ed LBC Information Services North Ryde 1997, 599; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 531, 536, 537–538; *Hume v Palmer* (1926) 38 CLR 441, 445–446, 451, 452–453, 461.

42 M Cappelletti *The Judicial process in comparative perspective* Clarendon Press Oxford 1989, 133.

43 *id.*, 133–137.

44 *id.*, 147.



with a more rigid adherence to the doctrines of the separation of powers, the supremacy of statutory law, the absence of the principle of stare decisis, the unsuitability of traditional civil law courts for judicial review, and a greater concern with an over-powerful, non-democratic judiciary.<sup>45</sup>

2.51 In Australia it is possible for federal legislation to establish a system in which no court other than the High Court, or perhaps the High Court together with some other federal court, could adjudicate matters arising under or involving the interpretation of the Constitution.

2.52 There are several arguments in favour of granting the High Court exclusive jurisdiction over constitutional matters. Such a change would ensure that all constitutional issues are determined by the nation's highest court, which has the greatest judicial authority and constitutional expertise. An exclusive constitutional jurisdiction could also increase the level of consistency in decision making because only one court would be exercising the jurisdiction. It could also be argued that many significant constitutional issues are likely to end up before the High Court under any system and that it is more efficient to enable the High Court to deal with such matters from the outset rather than relying on a system of appeals. However, it must be conceded that the provision of s 78B notices and the removal power in s 40 JA mean that, under the present system, constitutional cases in the lower courts can be readily identified and, if appropriate, removed to the High Court without passing through the normal appellate process (see Chapter 3).

2.53 Arguments against giving the High Court exclusive constitutional jurisdiction are that it could swamp the Court with constitutional issues that are of minor importance and would remove the filtering effect of the lower courts. This concern is exacerbated by a possible increase in the number of constitutional issues being raised in the courts. The constitutional net is widening, for example, with the development of arguments concerning implied constitutional rights. If the High Court were to hear more constitutional cases at first instance it would place additional pressure on its important appellate role in non-constitutional cases. A move towards exclusive constitutional jurisdiction would also run counter to the long Australian tradition of decentralised constitutional adjudication. Indeed, before the enactment of the *Judiciary Act* and the establishment of the High Court in 1903, state courts were the only Australian courts capable of applying and interpreting the Constitution.<sup>46</sup>

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<sup>45</sup> *ibid.*

<sup>46</sup> L Zines 'Federal, associated and accrued jurisdiction' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 266. Three recent cases in which a state court has considered a constitutional issue and which were appealed to the High Court are *Telstra*

2.54 As far as the Commission is currently aware, there is no body of evidence that suggests that the current system of constitutional adjudication is not working reasonably effectively, although in raising this issue the Commission seeks comments on the effectiveness of the current arrangements. Giving the High Court exclusive jurisdiction might also disrupt lower courts' case management systems by requiring those courts to adjourn proceedings until constitutional issues are determined in another forum. This could also affect litigation costs for parties. It might also lead to additional and potentially complex argument about whether an issue was a constitutional issue or not, with attendant costs and delays.

2.55 Further, the current system has a number of mechanisms to ensure that significant constitutional cases can be transferred to the High Court effectively and quickly. Two such mechanisms are the statutory notice provisions (s 78B JA) and removal under s 40 JA. Indeed, one view is that the High Court's role in interpreting the Constitution is already sufficiently privileged by these provisions. Section 78B notices enable the Attorneys-General to receive notice about matters pending in a federal, state or territory court involving a matter arising under the Constitution or involving its interpretation. The section is thus an important source of information about constitutional cases that may be suitable for determination by the High Court. Section 40 JA provides for the process of removal into the High Court of constitutional cases pending in other courts. Section 78B notices and the removal provisions are further discussed in Chapter 3.

2.56 For the reasons discussed above, the Commission's preliminary view is that there should be no amendment to give the High Court exclusive jurisdiction in matters falling within s 76(i) of the Constitution. However, if it were decided that the High Court should have exclusive jurisdiction in constitutional matters, the issue would arise as to how this could best be achieved. In particular, procedures would be necessary to remove cases from any court that did not have constitutional jurisdiction to the court or courts that did.

**Question 2.2.** Should the constitutional jurisdiction under s 76(i) of the Constitution be made exclusive to the High Court, and if so, what procedures might be adopted to facilitate that course?

**Question 2.3.** In practice, how burdensome might exclusive jurisdiction in constitutional matters be to the High Court? Would it impede the Court's ability to discharge its function as a general appellate court for Australia?

**Question 2.4.** How disruptive would it be to proceedings pending in other courts to have all constitutional matters removed for adjudication by the High Court?

**Question 2.5.** To what extent is the High Court's role in interpreting the Constitution already sufficiently privileged by the system of notices under s 78B of the *Judiciary Act*, together with the power of the Court to remove into it any constitutional matter pending in other courts pursuant to s 40 of the *Judiciary Act*?

## Matters arising under laws made by Parliament — section 76(ii) of the Constitution

### *Historical development*

2.57 Section 76(ii) of the Constitution enables Parliament to confer jurisdiction on the High Court in any matter 'arising under any law made by Parliament'. Unlike s 76(i) of the Constitution, s 76(ii) has never been fully implemented by legislation. There is no general law conferring original jurisdiction on the High Court in any matter arising under the laws of Parliament.<sup>47</sup> Cowen and Zines have explained the reasons for this legislative reticence in the following terms.

There has never been any *general* investment of original jurisdiction in any matter arising under any laws made by the Parliament for the obvious reason that this would impose an intolerable burden on the Court.<sup>48</sup>

2.58 In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*, Latham CJ said that a matter arises under federal law pursuant to s 76(ii)

[i]f the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law.<sup>49</sup>

<sup>47</sup> Compare s 39B(1A)(c) JA in relation to the Federal Court, as discussed at para 2.141–2.152.

<sup>48</sup> Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 6.

<sup>49</sup> (1945) 70 CLR 141, 154.

2.59 Historically, the High Court has had a substantial original jurisdiction under laws made by the Parliament. Until the 1970s, the High Court bore a significant load of original jurisdiction in relation to taxation, estate duty, gift duty, intellectual property, and miscellaneous matters of federal law.<sup>50</sup> In the absence of a federal court below the level of the High Court, jurisdiction was conferred on the High Court in a wide range of matters, in preference to investing jurisdiction in state superior courts under particular statutes. The perceived advantage of this approach was that the exercise of jurisdiction by the High Court offered

uniformity of interpretation by a court in which the Commonwealth would naturally have confidence as well as offering determination by a court which was linked to political responsibility on the part of the Commonwealth.<sup>51</sup>

2.60 However, there was continuing pressure to reduce the High Court's original jurisdiction under s 76(ii). The Commonwealth Industrial Court, which was established in 1956 and renamed the Australian Industrial Court in 1973, was given both an industrial jurisdiction and a non-industrial jurisdiction under certain federal statutes. More importantly, the establishment of the Federal Court in 1976 provided an alternative forum for the disposition of much of this work. The High Court's jurisdiction under s 76(ii) was consequently reduced, as jurisdiction was shifted from the High Court to the Federal Court.<sup>52</sup>

2.61 Under s 76(ii), Parliament may confer original jurisdiction on the High Court under a variety of statutes, including the *Judiciary Act*. One notable example is the conferral of jurisdiction under the *Commonwealth Electoral Act 1918* (Cth) (*Commonwealth Electoral Act*), which is discussed in paragraphs 2.63–2.80. Today, s 30(c) JA confers original jurisdiction on the High Court in 'trials of indictable offences against the laws of the Commonwealth'.<sup>53</sup> Presumably this is a subset of matters falling within s 76(ii), or possibly s 75(iii). However, as criminal jurisdiction is excluded from the Commission's terms of reference, no further comment on s 30(c) is necessary.

2.62 It is widely accepted that the High Court's principal functions are as a final court of appeal in matters of general law and as the final arbiter of the meaning of the Constitution. If the Court's original jurisdiction under s 76(ii) were widened, the Court's capacity to perform its principal functions effectively might be

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50 See A Mason 'The evolving role and function of the High Court of Australia' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 106–107.

51 id, 107.

52 id, 109.

53 See *R v Kidman* (1915) 20 CLR 425.

compromised. There is a danger that the Court would then be unduly burdened with matters that were not of sufficient legal significance to command the time and attention of Australia's highest court. This concern points to the need for Parliament and the government to consider very carefully any proposal to increase the High Court's jurisdiction pursuant to s 76(ii) of the Constitution. The same concern also points to the possibility of reducing the High Court's jurisdiction in s 76(ii) matters in appropriate areas by transferring such jurisdiction to other federal courts. One situation in which this might be done is where the Court sits as the Court of Disputed Returns under the *Commonwealth Electoral Act*.

### ***The Court of Disputed Returns***

2.63 In addition to s 30(c) JA, the High Court exercises original jurisdiction in some matters arising under laws made by the Parliament. For example, sitting as the Court of Disputed Returns, the Court has original jurisdiction under the *Commonwealth Electoral Act* in respect of disputed electoral returns and the qualifications of members of Parliament. In exercising its jurisdiction under the *Commonwealth Electoral Act*, the High Court has made a number of important pronouncements on the meaning of various provisions of the Constitution and on the scope of the power of the Court in relation to this jurisdiction.<sup>54</sup>

2.64 The courts' jurisdiction over disputed electoral returns can be traced to the practices of the United Kingdom Parliament in the 19<sup>th</sup> century. In the United Kingdom, the power to resolve disputed elections originally reposed in the House to which the election pertained. This situation prevailed until 1868, when legislation was passed conferring jurisdiction on two judges of the Queen's Bench.<sup>55</sup> The transfer of jurisdiction from Parliament to the courts was hastened by a concern with the partisanship of Parliament in ruling on electoral disputes.<sup>56</sup>

2.65 The Australian experience was similar.<sup>57</sup> The power to determine disputed elections was originally exercised by the relevant House and not by the courts. At the federal level, the power was conferred on the High Court in relation to disputed electoral matters concerning federal parliamentarians in 1918.<sup>58</sup> This legislation

54 *Re Wood* (1988) 167 CLR 145; *Sykes v Cleary* (1992) 176 CLR 77. See also P Schoff 'The electoral jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial power and incompatible function?' (1997) 25 *Federal Law Review* 317.

55 *Parliamentary Elections Act 1868* (UK).

56 P Schoff 'The electoral jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial power and incompatible function?' (1997) 25 *Federal Law Review* 317, 324.

57 K Walker 'Disputed returns and parliamentary qualifications: Is the High Court's jurisdiction constitutional?' (1997) 20 *UNSW Law Journal* 257, 263.

58 At the state level, the power to rule on electoral disputes has also been transferred from the legislature to the courts, although as late as 1969 in South Australia.

appears to have been the result of an acrimonious petition in the Senate challenging the election of a Senator.<sup>59</sup>

2.66 Section 47 of the Constitution states that questions about qualifications, vacancies and disputed elections are to be determined by the House in which the question arises until the Parliament otherwise provides. Parliament enacted the *Commonwealth Electoral Act* to provide for a Court of Disputed Returns (the Court) to determine such issues.

2.67 The Court has two types of jurisdiction. The first concerns the determination of petitions disputing elections for the Commonwealth Parliament (Part XXII, Div 1 *Commonwealth Electoral Act*). The second enables the Court to determine any question referred by Parliament concerning the qualifications of a Senator or Member of the House of Representatives or respecting a vacancy in either House of Parliament (Part XXII, Div 2 *Commonwealth Electoral Act*).

2.68 ***Disputed Elections and Returns — Pt XXII, Div 1 Commonwealth Electoral Act.*** Section 353 of the *Commonwealth Electoral Act* allows the validity of any election or return to be disputed by a petition addressed to the Court. Section 354(1) establishes the High Court as the Court of Disputed Returns and provides for the High Court to hear the petition or refer it for trial to the Federal Court or the Supreme Court of the state or territory in which the election was held or return made.<sup>60</sup> Where such a referral has been made, the Court that receives the referral has the jurisdiction to try the petition and has all the powers and functions of the Court of Disputed Returns in relation to the petition (s 354(2)). Under s 354(3), the High Court, in similar fashion to its remittal power under s 44 JA, may also remit part of a petition, being a part that involves a question or questions of fact, to either the Federal Court or the Supreme Court of the state or territory in which the election was held or the return made.

2.69 Section 360 sets out the powers of the Court in relation to the validity of an election or return, including the power to examine witnesses on oath; to adjourn; to award costs; to declare any election absolutely void; to dismiss or uphold the petition in whole or in part; and to punish any contempt of its authority.

2.70 Recent statistics suggest that the Court does not hear many cases under this jurisdiction. However, such cases are by their nature urgent and must be given

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59 P Schoff "The electoral jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial power and incompatible function?" (1997) 25 *Federal Law Review* 317, 331.

60 Section 354 was amended by the *Electoral and Referendum Amendment Act 1998* (Cth) to insert the reference to the Federal Court.

priority by the Court. The High Court's statistics as the Court of Disputed Returns for the period 1995–2000 are as follows.

**Table 1: Court of Disputed Returns — Caseload 1995–2000**

	1995–96	1996–97	1997–98	1998–99	1999–00
Election petitions <i>filed</i>	4	0	0	10	0
Election petitions <i>heard</i> by a Full Court.	0	2	0	2	1
Election petitions <i>heard</i> by a single Justice	na	2	0	10	10

Source: High Court of Australia *Annual report* various years.

**2.71 *Qualifications and vacancies — Pt XXII, Div 2 Commonwealth Electoral Act.*** Section 376 of the *Commonwealth Electoral Act* allows the Parliament to refer to the Court any question relating to the qualifications of a Senator or a Member of the House of Representatives or relating to a vacancy in the House or the Senate. Section 379 provides for additional powers of the Court in relation to qualifications or vacancies. The Court has power to declare any person as not qualified to be a Senator or Member and to declare that there is a vacancy in the Senate or the House.

**2.72 *Constitutional validity.*** One issue that has arisen is the constitutional validity of the Court of Disputed returns exercising the jurisdiction under Pt XXII, Div 1 and Div 2 of the *Commonwealth Electoral Act*. Commentators have expressed different views on this question, particularly as to whether the jurisdiction under Div 2 involves the exercise of the judicial power of the Commonwealth under Chapter III of the Constitution.<sup>61</sup> The argument is that Div 2 questions may involve the giving of an advisory opinion and thus be contrary to the rule in *In re Judiciary and Navigation Acts*<sup>62</sup> which prohibits the federal courts from giving such opinions.<sup>63</sup>

61 K Walker 'Disputed returns and parliamentary qualifications: Is the High Court's jurisdiction constitutional?' (1997) 20 *UNSW Law Journal* 257; P Schoff 'The electoral jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial power and incompatible function?' (1997) 25 *Federal Law Review* 317.

62 (1921) 29 CLR 257.

63 The jurisdiction of the High Court to give advisory opinions in relation to constitutional questions was inserted into the *Judiciary Act* in 1910 and subsequently repealed by the *Statute Law Revision Act 1934* (Cth) as a result of the decision of the High Court in *In re Judiciary and Navigation Acts* (1921) 29 CLR 257. The High Court found that section 76(i) of the Constitution did not empower the Parliament to confer on the High Court jurisdiction to determine abstract questions of law.

2.73 The constitutional issue was addressed in part by the High Court in *Sue v Hill*,<sup>64</sup> where a majority of the Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) upheld the validity of the *Commonwealth Electoral Act* in so far as it enabled the Court to determine a petition under s 354 of the *Commonwealth Electoral Act*. The petition concerned the question whether a Senator returned in the 1998 federal election failed to satisfy the requirements of s 44(i) of the Constitution, namely, that she was disqualified from office by virtue of being the citizen of a foreign power. The majority determined that the jurisdiction under Part XXII Div 1 relating to disputed elections and returns could be conferred on a federal court or a court exercising federal jurisdiction consistently with Chapter III of the Constitution.<sup>65</sup> As the dissenting justices (Kirby, McHugh and Callinan JJ) found that the Court had no jurisdiction to hear the petition before it, they did not address the issue of whether jurisdiction conferred on the Court of Disputed Returns might be incompatible with the exercise of judicial power under Chapter III of the Constitution.

2.74 *Sue v Hill* did not consider the validity of Div 2. However, Gaudron J noted that if it was construed as allowing the reference of discrete questions separate from the ultimate question of the right to sit and vote in a seat, then it would not require the determination of a legal right and hence would be invalid.<sup>66</sup>

2.75 **Policy considerations.** An issue that arises in this connection is whether the High Court or some other federal court, for example the Federal Court, should exercise jurisdiction in relation to electoral matters, in so far as they involve the exercise of judicial power.

2.76 One view is that the High Court should not exercise this original jurisdiction because such cases do not intrinsically raise issues of legal importance and, where they do, they may be removed to the High Court pursuant to s 40 JA. The High Court has a heavy workload in its original and appellate jurisdiction and it should not exercise original jurisdiction in electoral matters unless there is a demonstrated need for it to do so. While this jurisdiction does not appear to have generated a large number of cases overall, the Court's burden in some years has been significant, and every case requires the expenditure of Court time and resources, particularly if there are factual and legal complexities. The urgency of these matters may also disrupt the Court's orderly disposition of its regular judicial business.

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64 (1999) 163 ALR 648.

65 id, 659.

66 id, 687.



2.77 An alternative view is that the history of the Court's role demonstrates that cases before the Court of Disputed Returns are of significant public interest because they involve the purported election of federal parliamentarians. The authority of the High Court might be seen to stamp a degree of finality on a potentially contentious public debate in a way that might not be possible if the matter were entrusted to another court. Moreover, under s 354 of the *Commonwealth Electoral Act*, the High Court may try a petition concerning disputed elections or returns or refer it for trial to the Federal Court or to the Supreme Court of the state or territory in which the election was held or the return made. The High Court can also refer part of a petition, being a part that involves a question or questions of fact, to another court. The High Court can, therefore, exercise its discretion as to whether it or a lower court should hear a particular matter or part of a matter. However, it could be argued that the power to remit does not answer the more fundamental issue of whether the High Court should have original jurisdiction conferred on it in the first place.

2.78 The issue of whether questions referred to the Court under Pt XXII, Div 2 of the *Commonwealth Electoral Act* can be characterised as advisory opinions has been mentioned in paragraph 2.72. Prior to the decision in *Sue v Hill*, there appear to have been only two cases where a question under Div 2 has been decided by the High Court as the Court of Disputed Returns.<sup>67</sup> While the majority in *Sue v Hill* decided that the exercise of the Court's jurisdiction did not infringe the separation of powers embodied in Chapter III of the Constitution, the argument was centred on Div 1 petitions and the Court did not address the constitutional question in relation to Div 2. The constitutional validity of Pt XXII, Div 2 of the Act remains unresolved.

2.79 A further issue is whether the High Court needs to be referred to as the Court of Disputed Returns when exercising its electoral jurisdiction. In *Sue v Hill*, Gaudron J considered the argument that s 354(1) of the *Commonwealth Electoral Act* did not confer jurisdiction on the High Court as such, but that the Court was instead conscripted to act as a special electoral tribunal. Her Honour noted that s 354(1) could have been better expressed. However, she expressed the view that the wording in s 354(1) could be explained by reference to the fact that Parliament believed it was conferring a special jurisdiction on the Court and for the exercise of that jurisdiction the Court should be granted special status as the Court of Disputed Returns. As her Honour remarked

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<sup>67</sup> *Re Webster* (1975) 132 CLR 270 and *In Re Wood* (1988) 167 CLR 145; also see P Schoff 'The electoral jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial power and the incompatible function?' (1997) 25 *Federal Law Review* 317, 344.

[m]oreover it is apparent from the terms of s 360(1) [powers of the Court] that the jurisdiction was not intended to be reposed in a special tribunal whose functions the High Court was conscripted to perform but, instead, was conferred on the Court as an additional special jurisdiction with powers considered appropriate to its exercise.<sup>68</sup>

2.80 These comments raise the issue whether the title ‘Court of Disputed Returns’ should be abolished and the relevant jurisdiction, to the extent that it is constitutionally valid, conferred on the High Court directly, for example, under the *Judiciary Act* or the *Commonwealth Electoral Act*.

**Question 2.6.** Does the current allocation of original jurisdiction to the High Court under s 76(ii) of the Constitution comport with the Court’s principal functions as a final court of appeal in matters of general law and as final arbiter of the meaning of the Constitution?

**Question 2.7.** Should the High Court continue to act as the Court of Disputed Returns in relation to federal electoral matters? If not, should such matters be determined by another federal court in so far as they involve the exercise of federal judicial power, or by a federal tribunal in so far as they do not?

**Question 2.8.** Should the title ‘Court of Disputed Returns’ be abolished and the relevant jurisdiction be conferred on the High Court (or another federal court) directly, under the *Judiciary Act* or the *Commonwealth Electoral Act 1918* (Cth)?

**Question 2.9.** Does the continuing uncertainty about the validity of Part XXII Division 2 of the *Commonwealth Electoral Act 1918* (Cth) justify legislative reform of that Division?

### **The High Court’s exclusive jurisdiction — section 38 of the *Judiciary Act***

2.81 Section 77(ii) of the Constitution confers on the Parliament power to ‘define the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the states’. This Discussion Paper has already discussed whether this power should be invoked in relation to the High

<sup>68</sup> (1999) 163 ALR 648, 688.

Court's jurisdiction in matters arising under the Constitution, or involving its interpretation (see paragraphs 2.49–2.56).

2.82 Section 38 JA is the principal example of the exercise of the power conferred by s 77(ii) of the Constitution. It has changed very little since it was first enacted in 1903 and currently lists five categories of original jurisdiction that are exclusive of the jurisdiction of the several courts of the states. Section 38 currently provides as follows.

Subject to section 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:

- (a) matters arising directly under any treaty;
- (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
- (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
- (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
- (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

2.83 The impact of s 38 on the workload of the High Court has been reduced by the amendment of the remittal power in s 44 JA in 1984 to enable the High Court to remit any pending matter under s 38 (a), (b), (c) or (d) to the Federal Court or any court of a state or territory (see Chapter 3).

2.84 Section 38 is couched in language that might appear to suggest that the matters listed are *exclusive to* the High Court. Indeed, the heading of the section is given as 'Matters in which jurisdiction of High Court exclusive'. However, consistently with the terms of s 77(ii) of the Constitution itself, s 38 provides only that the listed matters are *exclusive of* the jurisdiction of the states. For example, any matter in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court falls within s 38(e) and thus cannot presently be determined by a state court. But this does not prevent jurisdiction in that class of matters being conferred on another federal court. In fact, s 39B(1) JA confers jurisdiction on the Federal Court in some of the matters identified in s 38(e). In summary, the exclusivity of the High Court's original jurisdiction depends not only on the terms of s 38, which excludes such jurisdiction from state courts, but on whether that jurisdiction has been conferred on other federal or territory courts. The answer to that question varies from paragraph to paragraph in s 38.

2.85 There is an issue as to whether the creation of a national court below the level of the High Court, namely the Federal Court, has removed or reduced the need for certain s 38 matters to be determined exclusively by the High Court. The Federal

Court is a national court with a broad civil jurisdiction and the capacity to deal with a range of complex issues. Some of the matters listed under s 38 may be appropriate for the Federal Court to decide. It is perhaps incorrect to assume that all matters listed in s 38 will necessarily involve significant constitutional issues or be nationally significant for legal or public policy reasons, and therefore be suitable for the exclusive original jurisdiction of the High Court. An example is *State Bank of New South Wales v Commonwealth Savings Bank of Australia*,<sup>69</sup> which concerned an ordinary contractual dispute and was exclusive to the High Court under s 38 only because of the identity of the parties to the action. The matter was accordingly commenced in the High Court but ultimately remitted to the Federal Court for determination.

2.86 The availability of suitable transfer mechanisms within the federal judicial system might also reduce the need for the High Court to have exclusive original jurisdiction in s 38 matters (see Chapter 3). If the Federal Court or a state court were granted jurisdiction in relation to some or all of the matters under s 38, the power of removal in s 40 JA could be used to ensure that the High Court could determine any case that warranted its attention.

2.87 The discussion below considers these issues in relation to each paragraph of s 38.

***Matters arising directly under any treaty — section 38 (a)***

2.88 Under s 38(a) JA the High Court is given exclusive original jurisdiction in respect of matters arising ‘directly’ under any treaty. Section 75(i) of the Constitution gives the Court original jurisdiction in relation to all matters ‘arising under any treaty’. It would appear that the High Court’s exclusive jurisdiction is confined to a subset of those matters falling within s 75(i). On this view, matters arising ‘directly’ under a treaty are excluded from state courts, whereas jurisdiction in respect of matters arising indirectly under a treaty may be allocated to both state and federal courts. To understand the purpose of s 38(a) JA it is necessary to consider the purpose of s 75(i) of the Constitution itself.

2.89 There is considerable debate as to whether s 75(i) serves any practical purpose. Cowen and Zines contend that it is difficult to see how a justiciable dispute could arise under s 75(i) and that the provision was the result of unreflective

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<sup>69</sup> (1984) 154 CLR 579.

copying of provisions of the United States Constitution.<sup>70</sup> Under s 75(i), ‘matter’ refers to some claim the subject of litigation. However, according to the rule in *Walker v Baird*<sup>71</sup> mere ratification of a treaty by Australia cannot directly regulate the rights and duties of citizens. The treaty must be implemented by statute to do so and it is then the statute and not the treaty that affects a citizen’s rights and duties. As Stephen J said in *Simsek v Macphee*

[a]ccepted doctrine in this Court [the High Court] is that treaties have ‘no legal effect upon the rights and duties of the subjects of the Crown’.<sup>72</sup>

2.90 This contrasts markedly with the position in the United States. The Congress is involved in the process of treaty ratification, but once ratified the treaty takes effect as the supreme law of the land, at least where it is self-executing.

2.91 Zines has suggested that s 38(a) JA is the result of copying in an unreflective manner from the United States Constitution, as was s 75(i) itself.<sup>73</sup> Leeming, on the other hand, suggests that the use of the word ‘directly’ in s 38(a) JA was the result of an amendment deliberately designed to ensure that state courts could continue to deal with matters that arose only indirectly under a treaty, while matters of national importance that arose *directly* under a treaty would be within the exclusive province of the High Court.<sup>74</sup> Leeming argues that the true construction of s 38(a) is that a matter will arise directly under a treaty when some justiciable right, obligation or immunity is conferred, imposed or affected by the treaty itself, without intervention by the domestic statute.<sup>75</sup> In his view, there are situations in which s 75(i) can have practical operation. These include consequences that might flow from a change of status that is conferred by Australia’s entry into a treaty — for example, changes to property rights, immunity from suit, the status of persons who were formerly aliens, and the precise location of international boundaries.<sup>76</sup>

2.92 In 1987 the Constitutional Commission’s Advisory Committee on the Australian Judicial System recommended that s 75(i) be retained in the Constitution, but not as entrenched jurisdiction of the High Court.<sup>77</sup> The Committee stated that

70 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 24–30; L Zines ‘Federal, associated and accrued jurisdiction’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 286–287.

71 [1892] AC 491.

72 (1982) 148 CLR 636, 641, citing *Chow Hung Ching v The King* (1948) 77 CLR 449.

73 L Zines ‘Federal, associated and accrued jurisdiction’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 286.

74 M Leeming ‘Federal treaty jurisdiction’ (1999) 10 *Public Law Review* 173, 176.

75 id, 177.

76 id, 175.

77 Advisory Committee to the Constitutional Commission *Australian Judicial System* Commonwealth of Australia Canberra 1987, 59.

s 75(i) could acquire practical meaning because of the broad interpretation given to the phrase ‘arising under’ in cases concerning s 76(ii). The Committee contended that the reasoning could ‘support the conclusion that a matter may arise under a treaty even though the treaty itself was not self-executing as a matter of Australian law’.<sup>78</sup>

2.93 The only early authority on the issue is *Bluett v Fadden*,<sup>79</sup> decided by McLelland J of the Supreme Court of New South Wales. His Honour held that s 75(i) must refer to cases where the decision in a matter depends upon the interpretation of the treaty.<sup>80</sup> His Honour added that he found it difficult to ascertain any subject matter falling within s 75(i) if the section did not refer to the type of case he had mentioned.

2.94 The first proceeding commenced in the High Court claiming to attract the Court’s original jurisdiction solely by reason of s 75(i) was *Re East; Ex parte Nguyen*<sup>81</sup> in 1998. The application was dismissed on the basis that the High Court’s jurisdiction had not in fact been attracted. In the majority’s view, to attract the jurisdiction of the High Court under s 75(i) of the Constitution there had to be a ‘matter’. The applicant failed to identify such a matter because he could not identify a justiciable controversy arising under a treaty. The joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ held that it was ‘unnecessary and therefore inappropriate’ to determine the precise scope of s 75(i).<sup>82</sup>

2.95 Only Kirby J addressed the issue. His Honour commented on the meaning of s 75(i) and approved of the broader view expressed by McLelland J. He said

a matter arises under a treaty if, directly or indirectly, the right claimed or the duty asserted owes its existence to the treaty, depends upon the treaty for its enforcement or directly or indirectly draws upon the treaty as the source of the right or duty in controversy.<sup>83</sup>

2.96 The doubts that have been raised about the practical worth of s 75(i) also throw into question the usefulness of the more restrictive subject matter in s 38(a) JA. This raises the issue whether s 38(a) should be repealed as a matter exclusive to the High Court. Putting to one side issues about the interaction of s 38(a) JA with s 75(i) of the Constitution, it is arguable that some matters arising

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78     *ibid.*

79     (1956) 54 SR (NSW) 254.

80     *id.*, 260.

81     (1998) 159 ALR 108. Also see *R v Donyadideh* (1993) 115 ACTR 1.

82     (1998) 159 ALR 108, 113.

83     *id.*, 132.

under a treaty, whether directly or indirectly, will not necessarily involve significant legal issues that warrant the attention of the High Court.

***Suits between states — section 38(b)***

2.97 Section 38(b) JA provides that the jurisdiction of the High Court shall be exclusive of that of the state courts in suits between states, between persons suing or being sued on behalf of different states, or between a state and a person suing or being sued on behalf of another state. Section 38(b) is linked to s 75(iv) of the Constitution, which provides that the High Court has original jurisdiction in matters between states. Section 75(iv) also provides that the High Court shall have original jurisdiction in matters between residents of different states — the so called ‘diversity jurisdiction’ — but this aspect of s 75(iv) does not find expression in s 38(b).

2.98 A number of commentators have questioned the appropriateness of the High Court having original jurisdiction based on a diversity of residence of the parties.<sup>84</sup> However, Cowen and Zines regard the grant of original jurisdiction to the High Court in relation to suits between states as a matter of ‘good sense’.<sup>85</sup> The position of the states in the Australian constitutional framework is said to be such that it is appropriate that justiciable disputes between them should be tried in the High Court, as a national court of undoubted impartiality at the apex of Australia’s judicial system. To have disputes between two states adjudicated in the courts of one of them might give rise to a concern about the appearance of impartiality. State courts are the judicial organs of their respective states, and are funded by state governments. There may be some perception of potential bias or compromise in some circumstances. Of course, similar concerns might be held in respect of claims by a citizen against a state, and where federal courts adjudicate matters in which the Commonwealth is a party. The logical implication of this argument for the federal sphere may require a re-evaluation of the argument as it is said to apply to the states.

2.99 The authors of the United States Constitution expressed a similar view about potential bias in relation to the clauses in the US Constitution on which s 75(iv) of the Australian Constitution were ultimately modelled. Writing of Art III of the United States Constitution in 1787, Alexander Hamilton remarked

84 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 34; also see L Zines ‘Federal, associated and accrued jurisdiction’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 284–285; M Pryles ‘The remission of High Court actions to subordinate courts and the law governing torts’ (1984) 10 *Sydney Law Review* 352; C Howard *Australian federal constitutional Law* 2<sup>nd</sup> ed Law Book Co Sydney 1972; M Pryles & P Hanks *Federal conflict of laws* Butterworths Sydney 1974, 134–141; C Cook ‘Section 79 Judiciary Act 1903 — How widely does it travel?’ (1987) 17 *Federal Law Review* 199.

85 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 34.

the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.<sup>86</sup>

2.100 Within a decade that view was to be undermined by the passage of the Eleventh Amendment to the US Constitution. That Amendment withdrew from the federal judicial power suits commenced against one state by the citizens of another state. Its effect was thus to provide each state with immunity from suit in federal courts. The Supreme Court's jurisprudence on the Amendment has been described as 'little more than a hodgepodge of confusing and intellectually indefensible judge-made law'.<sup>87</sup> Yet, despite the uncertainty, the cases affirm the view that federal courts are not regarded as ideal forums for the resolution of suits against states.

2.101 In Australia, concern with potential bias by state courts in dealing with inter-state matters has not been considered a significant issue. For example, Howard has stated that

[o]ur state judiciary is and always has been above all suspicion of bias in favour of local residents or in any other matter ...<sup>88</sup>

2.102 Yet, to the extent that s 38(b) is motivated by a desire to provide a neutral national forum in suits between two states, it could be argued that any apprehended bias in state adjudication could be allayed by adjudication of the dispute in the Federal Court, which like the High Court is a national court.

2.103 One option would be to allow the parties to such a dispute to commence proceedings in a state or territory court but with the proviso that, if one or both parties seek it, the matter may be transferred to the Federal Court or the High Court. Alternatively, the presumption could be reversed, so that such a matter normally begins in the Federal Court or the High Court but, if one or both parties seek it, the matter may be transferred to an appropriate state or territory court.

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<sup>86</sup> A Hamilton *The Federalist* No 80.

<sup>87</sup> Gibbons, 'The Eleventh Amendment and state sovereign immunity: A reinterpretation' (1983) 83 *Columbia Law Review* 1889, 1891. See recently *Alden v Maine* 199 S Ct 2240 (1999).

<sup>88</sup> C Howard *Australian federal constitutional law* 2<sup>nd</sup> ed Law Book Co Sydney 1972, 196.



2.104 Finally, several questions arise as to the interpretation of certain terms used in s 38(b) and the relationship of those terms to similar expressions used in the Constitution. In addition to its reference to suits between ‘States’, s 38(b) makes exclusive to the High Court suits ‘between persons suing or being sued on behalf of different States’, as well as suits between a state, on the one hand, and a ‘person suing or being sued on behalf of another State’. Similar expressions are used in s 38(c) and (d). Section 75(iv) of the Constitution does not extend to such a broad class of matters. Rather, it speaks of matters ‘between States’. It is only in relation to the Commonwealth that the Constitution explicitly broadens the description of the party to include ‘a person suing or being sued on behalf of the Commonwealth’ (s 75(iii)). Consideration should be given, therefore, to the merits of amending the relevant paragraphs of s 38 to ensure that the language applicable to suits in which a state is a party is no broader than that permitted by the Constitution. To so confine the language of the *Judiciary Act* is unlikely to impose many practical difficulties because of the broad interpretation given by the High Court to the scope of the term ‘State’ or ‘Commonwealth’ in s 75 of the Constitution.<sup>89</sup>

***Suits between the Commonwealth and a state — sections 38(c), (d)***

2.105 While no doubt there may be many cases where it is a matter of good sense that the High Court determines suits involving the Commonwealth and a state, there seems to be no compelling argument to justify every dispute between the Commonwealth and a state necessarily being determined by the High Court. For example, such disputes may not always involve significant legal, political or financial concerns. As suggested above, the Federal Court might constitute a more appropriate forum than the High Court, in at least some disputes under s 38(c) or (d). Options allowing the parties by consent to choose the most appropriate forum for the particular dispute may deserve further consideration. This would avoid a situation where the Commonwealth is compelled to have a dispute between it and a state determined in a state court.

***Prerogative relief against Commonwealth officers — section 38(e)***

2.106 Section 38(e) JA provides that the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several courts of the states in ‘matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court’.

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<sup>89</sup> See Ch 5.

2.107 As mentioned previously, although the power to grant prerogative relief in these situations is denied to the ‘several courts of the States’, s 39B(1) JA confers a similar jurisdiction on the Federal Court. That section provides that

The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

2.108 For the purpose of s 39B(1), the term ‘officer of the Commonwealth’ is defined to exclude judges of the Family Court or persons holding office under either of two named federal Acts — the *Workplace Relations Act 1976* (Cth) and the *Coal Industry Act 1946* (Cth).

2.109 Section 38(e) raises different considerations from the other paragraphs of the section in relation to whether state courts should be excluded from adjudicating these matters. In cases in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court the relevant law is likely to be federally based. It could be argued that in such cases only a federal court, if not the High Court, should have jurisdiction. To involve state courts in such matters may raise political and bureaucratic sensitivities about the respective responsibilities of federal and state courts in supervising the lawfulness of conduct of governmental officers. In the light of such concerns, in Chapter 7 the Commission asks whether the jurisdiction conferred by s 67C(b) JA on the Supreme Court of the Northern Territory in respect of prerogative writs against Commonwealth officers ought to be removed, or whether such a provision ought to be extended to the Australian Capital Territory.

2.110 On the other hand, it might be argued that giving the state courts jurisdiction in relation to writs concerning Commonwealth officers provides greater access to the courts for securing appropriate remedies. For example, state courts generally have more registries in their respective states than do federal courts, including registries in metropolitan and rural areas. Another argument is that the state courts’ involvement in such matters is consistent with the accepted practice of investing state courts with broad federal jurisdiction pursuant to s 77(iii) of the Constitution.

2.111 The issue of whether a state court should be able to hear an application for a prerogative writ against an officer of a federal court, as opposed to any other category of Commonwealth officer, is more complex still. This raises greater jurisdictional sensitivities because it may involve the state court reviewing the actions of a federal court officer or a federal judge. Since many claims for prerogative relief against federal judges concern the jurisdictional limits of the courts in which those judges sit, it may be thought inappropriate to allow such matters to be determined outside the federal courts themselves.

2.112 A further issue is the relationship between s 38(e) JA and s 75(v) of the Constitution. Section 75(v) states that the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Section 38(e) JA provides that the High Court has jurisdiction exclusive of state courts in relation to matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court. Section 38(e) is thus in different terms to s 75(v). The former refers not only to ‘an officer of the Commonwealth’ but also to an officer of a ‘federal court’, while the latter refers to relief by way of injunction, but the former does not. The case law has established that a Commonwealth Minister is an officer of the Commonwealth,<sup>90</sup> as are judges of the Federal Court and the Family Court,<sup>91</sup> but not a judge of a state court invested with federal jurisdiction pursuant to s 77(iii) of the Constitution.<sup>92</sup>

2.113 Neither the Constitution nor the *Judiciary Act* defines the term ‘officer of the Commonwealth’. Lane suggests a wide definition of the term under s 75(v), namely, a person who is appointed by the Commonwealth to carry out a Commonwealth function or purpose.<sup>93</sup> Historically, the term has acquired an increasingly wide meaning. Aronson and Dyer comment, in relation to s 75(v), that

[t]he main point of the section should be to ensure judicial supervision of the execution of Commonwealth statutes and the exercise by the Commonwealth Executive of its common law and prerogative powers. Whether the Commonwealth chooses to perform its tasks via central departments, statutory authorities, its own companies, or private sector bodies is surely irrelevant to that point.<sup>94</sup>

2.114 One issue arising in this context is whether the term should be defined in the *Judiciary Act* and if so, whether it is necessary to include an officer of a federal court as part of the definition. If no definition is included and reliance is placed instead on the meaning of the constitutional term in s 75(v), it must also be asked what is gained from including ‘an officer of a federal court’ in the category of persons against whom prerogative relief may be sought under s 38(e).

90 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 54.

91 *R v Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (Inc)* (1979) 143 CLR 190 ; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co* (1914) 18 CLR 54.

92 *R v Murray & Cormie; Ex parte Commonwealth* (1916) 22 CLR 437, 452, 464, 471.

93 P Lane *Lane's commentary on the Australian Constitution* 2<sup>nd</sup> ed LBC Information Services North Ryde 1997, 585.

94 M Aronson & B Dyer *Judicial review of administrative action* LBC Information Services Sydney 1996, 37.

2.115 Issues also arise concerning prerogative writs and sections 31 to 33 JA. Section 75(v) of the Constitution concerns matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Sections 31, 32 and 33 JA also deal with the High Court's remedial powers, but the sections come into operation only where the Court's jurisdiction has been otherwise established.<sup>95</sup>

2.116 Section 31 provides that the High Court in the exercise of its original jurisdiction may make and pronounce all such judgments as are necessary for doing complete justice in any cause or matter pending before it, and may for the execution of any such judgment direct the issue of such process as is prescribed by the *Judiciary Act* or by Rules of Court. Section 32 provides that the High Court in the exercise of its original jurisdiction has power to grant all such remedies as any of the parties are entitled to in respect of any legal or equitable claim so that as far as possible all matters in controversy between the parties may be completely and finally determined.

2.117 Section 33 provides

- 33(1) The High Court may make orders or direct the issue of writs:
- (a) commanding the performance by any court invested with federal jurisdiction, of any duty relating to the exercise of its federal jurisdiction; or
  - (b) requiring any court to abstain from the exercise of any federal jurisdiction which it does not possess; or
  - (c) commanding the performance of any duty by any person holding office under the Commonwealth; or
  - (d) removing from office any person wrongfully claiming to hold any office under the Commonwealth; or
  - (e) of mandamus; or
  - (f) of habeas corpus.
- (2) This section shall not be taken to limit by implication the power of the High Court to make any order or direct the issue of any writ.

2.118 Section 33 is more specific than either s 75(v) of the Constitution or s 38(e) JA in that it refers to commanding the performance by any court invested with federal jurisdiction of any duty relating to the exercise of its federal jurisdiction, commanding or removing a Commonwealth officer and issuing mandamus or habeas corpus. However, s 33 appears to have had little substantive impact. As Lane comments

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<sup>95</sup> The Law Book Company Limited *The laws of Australia* Vol 2 Administrative Law para 93; P Lane *Lane's commentary on the Australian Constitution* 2<sup>nd</sup> ed LBC Information Services North Ryde 1997, 589.

[d]espite its apparent self-sufficiency, the section is a mere aid to, or elaboration of, the court's jurisdiction which must otherwise obtain.<sup>96</sup>

2.119 Thus it has been held that the section does not enlarge the jurisdiction of the High Court in relation to mandamus,<sup>97</sup> that s 33(1)(a) and (e) do no more than authorise the making of orders in which the Court is otherwise seized of jurisdiction,<sup>98</sup> and that the power to order the issue of a writ of habeas corpus can be exercised only as an incident of the exercise of the original or appellate jurisdiction of the court under other provisions.<sup>99</sup>

2.120 One issue to consider is the role of s 33 and whether any of its paragraphs should be repealed on the basis that they merely duplicate the remedial powers implicit in s 75(v) of the Constitution and made exclusive of the states by s 38(e) JA. Another possible change is to amend s 33 to make specific reference to each of the prerogative writs mentioned in the Constitution. Such an amendment would clarify which writs are encompassed by the provisions and how the section relates to s 75(v) of the Constitution.

**Question 2.10.** What criteria should be used to determine which matters listed in sections 75 and 76 of the Constitution are appropriate for determination by the High Court to the exclusion of the states? Should the subject matter of the action or the identity of the parties be relevant or determinative?

**Question 2.11.** Should the *Judiciary Act* be amended to make it clearer that s 38 matters are not necessarily exclusive to the High Court but rather that they are exclusive of the jurisdiction of the courts of the states?

**Question 2.12.** Does the existence of the Federal Court, as a national court below the level of the High Court, remove or reduce the need for certain matters listed in s 38 of the *Judiciary Act* to be adjudicated exclusively by the High Court? For example, if the enactment of s 38(b) was motivated by a desire to provide a neutral federal forum in suits between states, would any apprehended bias in state adjudication be allayed by adjudication of the dispute in a national court such as the Federal Court?

96 P Lane *Lane's commentary on the Australian constitution* 2<sup>nd</sup> ed LBC Information Services North Ryde 1997, 589.

97 *R v Governor of South Australia* (1907) 4 CLR 1497.

98 *Re Loveday; Ex parte Clyne* (1984) 61 ALR 136.

99 *Re Officer in Charge of Cells, ACT Supreme Court; Ex parte Eastman* (1994) 123 ALR 478.

**Question 2.13.** To what extent does the possibility of transfer of a proceeding to the High Court, for example under the removal provisions in s 40 of the *Judiciary Act*, reduce the need for the High Court to have exclusive original jurisdiction under s 38 of the *Judiciary Act*?

**Question 2.14.** When do matters arise *directly* under a treaty within the meaning of s 38(a) of the *Judiciary Act*? Should this jurisdiction be retained as part of the High Court's exclusive jurisdiction?

**Question 2.15.** Should s 38 be amended to permit suits between states or between the Commonwealth and a state to be commenced in a state court? If so, should provision be made for the transfer of such a case to a federal court on the application of one or more parties?

**Question 2.16.** Should the phrases in s 38(b), (c) and (d) relating to a 'person suing or being sued on behalf of a State' be amended to ensure that s 38 is no wider than the expressions used in s 75(iv) of the Constitution?

**Question 2.17.** Should state courts continue to be deprived of the capacity to grant prerogative relief against Commonwealth officers? If not, should the power of state courts to grant such remedies extend to prerogative relief directed to federal judges?

**Question 2.18.** What is the appropriate relationship between the jurisdiction conferred on the High Court by s 75(v) of the Constitution, the exclusive matters listed in s 38(e) of the *Judiciary Act*, and the power to make the orders listed in s 33 of the *Judiciary Act*? Should s 33 be repealed?

## **Original jurisdiction of the Federal Court**

### **An expanding jurisdiction**

2.121 Section 77(i) of the Constitution empowers the Parliament to make laws 'defining the jurisdiction of any federal court other than the High Court' in respect of the matters described in sections 75 and 76. Unlike state Supreme Courts, which are courts of general jurisdiction, federal courts may only be conferred with

jurisdiction to decide cases that fall into the categories described in sections 75 and 76, and which satisfy the constitutional description of ‘matter’.<sup>100</sup>

2.122 Prior to the establishment of the Federal Court in 1976, most matters that arose under federal laws, within the meaning of s 76(i) of the Constitution, were dealt with routinely in the state courts pursuant to s 39 JA.<sup>101</sup> The principal exceptions were bankruptcy and industrial relations matters, for which specialised federal courts had already been established,<sup>102</sup> and the miscellany of federal statutes that had conferred original jurisdiction on the High Court (see paragraphs 2.59–2.61).

2.123 The *Federal Court of Australia Act 1976* (Cth) does not completely define the jurisdiction of the Federal Court.<sup>103</sup> Section 19(1) FCAA provides that ‘[t]he Court has such original jurisdiction as is vested in it by laws made by the Parliament, being jurisdiction in respect of matters arising under laws made by the Parliament.’ Accordingly, it is necessary to look to other provisions in federal legislation to find the ambit of the Federal Court’s original jurisdiction. Those provisions may currently be found in

- ?? the *Judiciary Act*, especially s 39B
- ?? the *Federal Court of Australia Act*, especially sections 19 and 32, and
- ?? miscellaneous federal statutes under which jurisdiction is conferred on the Court (see Table 2).

2.124 When the Federal Court was established, it was conceived as a ‘small court’ with limited jurisdiction as conferred by Parliament from time to time.<sup>104</sup> In addition to industrial law and bankruptcy, its principal areas of jurisdiction were initially trade practices law and review of federal administrative action. Over time that jurisdiction has significantly expanded. This can be seen in the increasing number and diversity of federal statutes that now confer jurisdiction on the Court. But its expanded role is also evident in the broad categories of federal jurisdiction that have been conferred on the Court progressively since its inception. This gradual expansion appears to have fulfilled Campbell J’s prophecy in 1979 that

100 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Crouch v Commissioner for Railways (Queensland)* (1985) 159 CLR 22, 37. See also *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616.

101 G Griffith & G Kennett ‘Judicial federalism’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 44.

102 The Federal Court of Bankruptcy was established in 1930 and its jurisdiction transferred to the Federal Court of Australia in 1976; the Commonwealth Court of Conciliation and Arbitration was established in 1904, and was later reformed as the Commonwealth Industrial Court and its jurisdiction transferred to the Federal Court in 1976.

103 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 488.

104 *Hansard* (H of R) 21 October 1976, 2111.

[t]he more that federal jurisdiction is conferred on federal courts, the more it is likely to seem appropriate to confer further federal jurisdiction on these courts.<sup>105</sup>

2.125 The principal developments in the Federal Court's jurisdiction are outlined below. Some of these are discussed in further detail below.

- ?? In 1976, s 32 FCAA conferred jurisdiction on the Federal Court in 'associated' matters. The section takes as its basis the fact that the Federal Court is not given jurisdiction to the full extent possible under sections 75 and 76 of the Constitution. The purpose of the provision is to ensure that when the Court adjudicates a matter, it may also deal with any 'associated' federal matters that have not otherwise been conferred on the Court, but which nevertheless fall within sections 75 and 76, and so could be conferred on the Court pursuant to s 77(i) of the Constitution.
  
- ?? In the early 1980s the High Court refined the judicial doctrine of the 'accrued jurisdiction' of the Federal Court, which had first been developed by the High Court in relation to its own jurisdiction in the 1940s.<sup>106</sup> Accrued jurisdiction expands the range of matters that can be adjudicated in the Federal Court. It allows the Court to adjudicate claims that would have been non-federal, and therefore outside the Court's jurisdiction, but for the fact that they are attached to and inseverable from federal claims that do fall within the Court's statutory jurisdiction (see paragraphs 2.161–2.166).
  
- ?? In 1983, jurisdiction was conferred on the Federal Court in matters in which certain prerogative writs are sought against Commonwealth officers (s 39B(1)).<sup>107</sup> This jurisdiction derives from s 75(v) of Constitution but does not fully implement that paragraph — under s 39B(2) JA certain Commonwealth officers are excluded from the jurisdiction conferred by s 39B(1). Amendments are presently before Parliament to expand the exceptions to remove Federal Court jurisdiction in any mandamus application related to a Commonwealth criminal prosecution that is heard, or is proposed to be heard, before a court of a state or territory.<sup>108</sup>
  
- ?? Throughout the 1980s and 1990s there was a dramatic rise in the number and variety of federal Acts that conferred jurisdiction on the Federal Court. Upon its creation in 1976, the Federal Court was invested with original jurisdiction

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105 W Campbell 'The Relationship between the Federal Court and the Supreme Courts of the states' (1979) 11 *University of Queensland Law Journal* 3, 4–5.

106 *Carter v Egg & Egg Pulp Marketing Board* (1942) 66 CLR 557.

107 *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth).

108 Jurisdiction of Courts Legislation Amendment Bill 2000, Sch 2, sections 39B(1B), (1C) and (1D).



in approximately 13 federal Acts, which had previously been administered by other federal courts.<sup>109</sup> By June 1992, there were approximately 100 such Acts, and by June 2000, 149 Acts were listed in the Federal Court's Annual Report.

- ?? In 1987, the Federal Court was invested with jurisdiction in state matters under the general cross-vesting scheme and under parallel schemes applicable to particular fields.<sup>110</sup> One significant area in which the Federal Court exercised 'state jurisdiction' arose under each state's *Corporations Law*. However, in 1999 in *Re Wakim; Ex parte McNally*<sup>111</sup> the High Court invalidated those parts of the co-operative legislative scheme that purported to invest state jurisdiction in federal courts. For the eleven years for which it operated, the legislation effected a significant expansion in the jurisdiction of the Federal Court.
- ?? In 1997, jurisdiction was conferred on the Federal Court in matters in which the Commonwealth is seeking an injunction or a declaration (s 39B(1A)(a) JA).<sup>112</sup> This jurisdiction derives from s 75(iii) of the Constitution but does not fully implement that paragraph — it refers only to suits in which the Commonwealth is a plaintiff, and even then it is limited to claims for certain kinds of remedies.
- ?? In 1997, jurisdiction was conferred on the Federal Court in matters 'arising under the Constitution, or involving its interpretation' (s 39B(1A)(b) JA).<sup>113</sup> This jurisdiction derives from s 76(i) and fully implements that paragraph. The extent to which this new paragraph expanded the Court's jurisdiction is probably less than might at first appear — before 1997 the Court was accustomed to determining constitutional issues that arose in the course of adjudicating matters within its jurisdiction (see paragraphs 2.129–2.136).
- ?? In 1997, jurisdiction was conferred on the Federal Court in matters 'arising under any laws made by the Parliament' (s 39B(1A)(c) JA).<sup>114</sup> This jurisdiction derives from s 76(ii) of the Constitution and fully implements that

109 See *Federal Court of Australia (Consequential Provisions) Act 1976* (Cth) and *Conciliation and Arbitration Amendment Act (No 3) 1976* (Cth), transferring jurisdiction from the Australian Industrial Court; and *Bankruptcy Amendment Act 1976* (Cth), transferring jurisdiction from the Federal Court of Bankruptcy.

110 See eg *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) and cognate state and territory legislation. (1999) 198 CLR 511.

111 *Law and Justice Legislation Amendment Act 1997* (Cth).

112 *Law and Justice Legislation Amendment Act 1997* (Cth).

113 *Law and Justice Legislation Amendment Act 1997* (Cth).

114 *Law and Justice Legislation Amendment Act 1997* (Cth).

paragraph. This is perhaps one of the most remarkable, and yet unremarked, features of the expansion of the Federal Court's jurisdiction. Its effect would appear to eliminate the need to rely on the sundry federal Acts conferring jurisdiction on the Court since it invests the Court with jurisdiction under the entire corpus of federal law (see paragraphs 2.141-2.152).

2.126 In some respects the developments briefly described above understate the depth of the Federal Court's jurisdiction. For example, in its appellate jurisdiction the Court hears criminal appeals from the Australian Capital Territory, although it has virtually no original criminal jurisdiction (see Chapters 4, 7). Moreover, it has recently been suggested that the Federal Court has jurisdiction to determine common law claims (apart from any accrued jurisdiction) in the Australian Capital Territory and, by analogy, the Northern Territory, because of the way in which the Commonwealth Parliament provided for governance of the territories at an early stage of their histories (see Chapter 7).<sup>115</sup>

2.127 The expanding jurisdiction of the Federal Court invites re-examination of the policies behind its original conception as a 'small court', and whether they have been displaced by policies that view the Federal Court differently — as a 'big' court with general jurisdiction in federal matters.

2.128 While the Federal Court's original jurisdiction has become increasingly diverse since its establishment, it still does not cover all matters that fall within the categories described in sections 75 and 76 of the Constitution. Notwithstanding decisions such as *Re Wakim; Ex parte McNally*<sup>116</sup> and *R v Hughes*,<sup>117</sup> further expansion remains possible. While some matters, such as diversity cases pursuant to s 75(iv) of the Constitution, may be thought unsuitable for Federal Court jurisdiction, there may be scope for further expansion in other areas. For example, it is possible to invest the Federal Court with jurisdiction over claims against the Commonwealth pursuant to s 75(iii) of the Constitution.

### **Matters arising under the Constitution — section 76(i) of the Constitution.**

2.129 Until 1997 the Federal Court had no express power to adjudicate constitutional questions. In that year, s 39B(1A)(b) was inserted into the *Judiciary Act*, conferring on the Court jurisdiction in any matter 'arising under the Constitution, or involving its interpretation'.<sup>118</sup> That paragraph fully implements the

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115 *O'Neill v Mann* [2000] FCA 1180 (23 August 2000) (Finn J).

116 (1999) 198 CLR 511.

117 (2000) 171 ALR 155.

118 *Law and Justice Legislation Amendment Act 1997* (Cth).

power in s 77(ii) of the Constitution to ‘define the jurisdiction’ of the Federal Court with respect to matters within s 76(i) of the Constitution.

2.130 The 1997 amendment put the Federal Court’s constitutional jurisdiction beyond doubt. However, the capacity of federal courts to determine constitutional matters in the absence of an express statutory grant of jurisdiction still has relevance for the Family Court and the Federal Magistrates Court. Accordingly, it is instructive to examine the position of the Federal Court prior to 1997.

2.131 The power of the Federal Court to adjudicate constitutional questions has been upheld from its earliest years, although the basis of this jurisdiction has been explained in at least three different ways.<sup>119</sup> In the leading case, *Re Tooth & Co Ltd (No 2)*,<sup>120</sup> the question in issue was the Court’s authority to rule on the validity of a section of the *Trade Practices Act 1974* (Cth), namely s 47(9)(a) (exclusive dealing). Section 163A of that Act entitled a person to institute a proceeding in the Federal Court ‘in relation to a matter arising under this Act’ seeking certain orders. The Court unanimously held that its jurisdiction extended to determining the constitutional validity of the impugned section. One reason for so finding was that the constitutional validity of the provision was inherent in its operation and effect since ‘if it is invalid it can have no operation or effect’.<sup>121</sup> As Brennan J put it, ‘the court is not deprived of its jurisdiction under s 163A because the matter in litigation both arises under the *Trade Practices Act* and involves the interpretation of the Constitution’.<sup>122</sup> Bowen CJ explained the position as follows

[i]f then total invalidity of the provision is suggested, does the court cease to have jurisdiction to determine that question? It does not seem to be a very sensible line to draw and I would not draw it there, unless the words of the section clearly required it ... As validity of a law is a condition on which it can operate, it is natural for a power to adjudicate on that condition to be caught up with a power to make a declaration as to the operation or effect of the law.<sup>123</sup>

2.132 This explanation suggests that when the Federal Court is invested with jurisdiction in any matter arising under an Act, determination of the constitutional

119 Whether the Federal Court’s constitutional jurisdiction can be made exclusive of that of any other court has been doubted by the High Court. See *R v Judges of the Federal Court of Australia; ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190. In particular, Barwick CJ commented (at 200) that the Federal Court’s determination of a constitutional question could not exclude the possibility of High Court review by way of a prerogative writ under s 75(v) of the Constitution.

120 (1978) 34 FLR 112.

121 id, 120 (Franki J).

122 id, 140 (Brennan J) citing Latham CJ in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154. Brennan J reiterated this finding in *Re Ku-Ring-Gai Co-Operative Building Society (No 12) Ltd* (1978) 36 FLR 134, 146.

123 (1978) 34 FLR 112, 120 (Bowen CJ).

validity of that Act is part of the same ‘matter’. In *Grace Bros Pty Ltd v Magistrates of the Local Courts of New South Wales* Gummow J clarified this connection in relation to the *Trade Practices Act*.

In the present case, the immunity from the state law which the applicant asserts is the product not simply of the federal law in question but of the operation of s 109 of the Constitution. The matter thus also may answer the description ‘arising under this Constitution or involving its interpretation’ within the meaning of sub-s 76 (i) of the Constitution: *Ex parte McLean* (1930) 43 CLR 472; *Belton v General Motors-Holden's Ltd* (1984) 58 ALJR 352. Nevertheless, the jurisdiction of this Court, attracted under s 163A by the existence of a matter arising under a federal law, is not lost or diminished and extends to the whole of the controversy in the sense indicated above, including the constitutional question: *Re Tooth & Co Ltd (No. 2)* (1978) 34 FLR 112 at 119, 130, 139-140.<sup>124</sup>

2.133 The second basis on which the Federal Court’s constitutional jurisdiction has been explained is the ‘associated jurisdiction’ conferred by s 32 FCAA. The nature of this jurisdiction is more fully explained below (see paragraphs 2.153-2.155). In *Re Tooth & Co Ltd (No 2)*,<sup>125</sup> Franki and Brennan JJ adopted this as an alternative basis of the Federal Court’s constitutional jurisdiction.

2.134 A third possibility, which has not been fully explored in the cases, is that the power to determine constitutional questions is inherent in all courts because of the overriding effect of covering cl 5 of the Constitution. This clause provides that

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every state and of every part of the Commonwealth, notwithstanding anything in the laws of any state ...<sup>126</sup>

2.135 In *Re Colina ex parte Torney*,<sup>127</sup> several justices of the High Court gave an expansive interpretation of the inherent powers of the High Court and the Family Court to punish contempt. They described this as a power arising not necessarily from legislation but as ‘an attribute of the judicial power of the Commonwealth which is vested in those Courts by s 71’. In *Mercator Property Consultants Pty Ltd v Christmas Island Resort Pty Ltd*,<sup>128</sup> French J applied *Re Colina*, by way of analogy, to find an inherent power in the Federal Court to order a stay of proceedings where the Court has determined that it lacks jurisdiction. Similar reasoning might be used to extend the jurisdiction of federal courts to decide

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124 (1988) 84 ALR 492, 496.

125 (1978) 34 FLR 112, 131 (Franki J), 139–40 (Brennan J).

126 *Commonwealth of Australia Constitution Act 1900* (Imp), s 5.

127 (1999) 166 ALR 545, 551.

128 (1999) 94 FCR 384.

constitutional questions relevant to the exercise of their jurisdiction arising under federal laws.

2.136 The first and second explanations discussed above have inherent limitations, which have been by-passed for the Federal Court by the enactment of s 39B(1A)(b) JA. The associated jurisdiction requires some degree of ‘association’ between the constitutional matter and the matter in respect of which jurisdiction has already been conferred on the Court. Similarly, the explanation based on the constitutional conception of a ‘matter’ only enables the Federal Court to adjudicate claims that would otherwise be outside its jurisdiction if they are attached to and not severable from the claim within its jurisdiction (see paragraphs 2.161–2.166). By contrast, the grant of jurisdiction under s 39B(1A)(b) JA is independent of any association or relationship to any other matters within the Court’s jurisdiction. This now enables the Federal Court to do what the High Court and state courts have been able to do since 1903, namely to hear and determine constitutional matters that are unconnected with any matter arising under federal laws.<sup>129</sup>

**Question 2.19.** Should jurisdiction be expressly conferred on the Family Court and the Federal Magistrates Court to hear and determine matters arising under the Constitution or involving its interpretation? Of what relevance is it that the High Court, the Federal Court and the several courts of the states already possess this jurisdiction?

### **Matters arising under laws made by Parliament — section 76(ii) of the Constitution**

2.137 One of the most significant aspects of the jurisdiction of the Federal Court is its jurisdiction in matters arising under laws made by Parliament. This jurisdiction can be seen as having two components — the conferral of jurisdiction under specific federal statutes since 1976, and the conferral of general jurisdiction by s 39B(1A) JA since 1997. The co-existence of two sources of jurisdiction since 1997 has generated some difficulty, as is discussed further below.

#### ***Jurisdiction under specific federal statutes***

2.138 Mention has already been made of the dramatic rise in the number of federal statutes that have conferred jurisdiction on the Federal Court since its creation in 1976. From humble beginnings, the Federal Court’s latest *Annual report* now lists

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<sup>129</sup> See s 30(a) JA in respect of the High Court and s 39 JA in respect of state courts.

as many as 149 Acts conferring jurisdiction on the Court. The complete list of Acts is given in Table 2 below. Amongst this miscellany, the principal areas of original jurisdiction are

- ?? trade practices
- ?? review of federal administrative action
- ?? native title
- ?? admiralty, and
- ?? bankruptcy.

2.139 The conferral of jurisdiction on the Federal Court by these Acts is aided by s 15C of the *Acts Interpretation Act 1901* (Cth), which provides

Where a provision of an Act, whether expressly or by implication, authorizes a civil or criminal proceeding to be instituted in a particular court in relation to a matter:

- (a) that provision shall be deemed to vest that court with jurisdiction in that matter;
- (b) except so far as the contrary intention appears, the jurisdiction so vested is not limited by any limits to which any other jurisdiction of the court may be subject; and
- (c) in the case of a court of a territory, that provision shall be construed as providing that the jurisdiction is vested so far only as the Constitution permits.

2.140 As a consequence, any federal Act that allows for a civil proceeding to be commenced in the Federal Court has the effect of conferring jurisdiction on that Court.

**Table 2: Principal statutes conferring jurisdiction on the Federal Court  
(as at 30 June 2000)**

<i>Aboriginal and Torres Strait Islander Commission Act 1989</i>	<i>Banking Act 1959</i>
<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>	<i>Bankruptcy Act 1966</i>
<i>Aboriginal Councils and Associations Act 1976</i>	<i>Broadcasting Act 1942</i>
<i>Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987</i>	<i>Broadcasting Services Act 1992</i>
<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>	<i>Building Industry Act 1985</i>
<i>Administrative Appeals Tribunal Act 1975</i>	<i>Charter of the United Nations Act 1945</i>
<i>Administrative Decisions (Judicial Review) Act 1977</i>	<i>Circuit Layouts Act 1989</i>
<i>Admiralty Act 1988</i>	<i>Civil Aviation (Carriers' Liability) Act 1959</i>
<i>Advance Australia Logo Protection Act 1984</i>	<i>Close Corporations Act 1989</i>
<i>Agricultural and Veterinary Chemicals Act 1994</i>	<i>Commonwealth Authorities and Companies Act 1997</i>
<i>Air Navigation Act 1920</i>	<i>Commonwealth Electoral Act 1918</i>
<i>Airports Act 1996</i>	<i>Commonwealth Places (Mirror Taxes) Act 1998</i>
<i>Anti-Personnel Mines Convention Act 1998</i>	<i>Commonwealth Serum Laboratories Act 1961</i>
<i>Australian Federal Police Act 1979</i>	<i>Complaints (Australian Federal Police) Act 1981</i>
<i>Australian Industry Development Corporation Act 1970</i>	<i>Constitutional Convention (Election) Act 1997</i>
<i>Australian National Railways Commission Sale Act 1997</i>	<i>Copyright Act 1968</i>
<i>Australian Postal Corporation Act 1989</i>	<i>Corporations Act 1989</i>
<i>Australian Radiation Protection and Nuclear Safety Act 1998</i>	<i>Crimes Act 1914</i>
	<i>CSL Sale Act 1993</i>
	<i>Customs Act 1901</i>
	<i>Dairy Produce Act 1986</i>
	<i>Debits Tax Administration Act 1982</i>

*Australian Securities and Investments Commission Act  
1989*

*Australian Sports Drug Agency Act 1990*

*Australian Wine and Brandy Corporation Act 1980*

*Defence Act 1903*

*Defence Force Discipline Appeals Act 1955*

*Designs Act 1906*

*Diplomatic and Consular Missions Act 1978*

*Disability Discrimination Act 1992*

- Employment Services Act 1994*  
*Endangered Species Protection Act 1992*  
*Estate Duty Assessment Act 1914*  
*Evidence Act 1995*  
*Evidence and Procedure (New Zealand) Act 1994*  
*Export Markets Development Grants Act 1997*  
*Extradition Act 1988*  
*Federal Court of Australia Act 1976*  
*Federal Court of Australia (Consequential Provisions) Act 1976*  
*Federal Proceedings (Costs) Act 1981*  
*Financial Corporations Act 1974*  
*Financial Sector (Shareholdings) Act 1998*  
*Financial Sector (Transfer of Business) Act 1999*  
*Financial Transaction Reports Act 1988*  
*Fisheries Management Act 1991*  
*Foreign Acquisitions and Takeovers Act 1975*  
*Foreign Evidence Act 1994*  
*Foreign Judgments Act 1991*  
*Foreign Proceedings (Excess of Jurisdiction) Act 1984*  
*Foreign States Immunities Act 1985*  
*Fringe Benefits Tax Assessment Act 1986*  
*Gas Pipelines Access (Commonwealth) Act 1998*  
*Gift Duty Assessment Act 1941*  
*Great Barrier Reef Marine Park Act 1975*  
*Hazardous Waste (Regulation of Exports and Imports) Act 1989*  
*Health Insurance Act 1973*  
*Health Insurance Commission Act 1973*  
*Health Insurance Commission (Reform and Separation of Functions) Act 1997*  
*Hearing Services Administration Act 1997*  
*Hearing Services and AGHS Reform Act 1997*  
*Human Rights and Equal Opportunity Commission Act 1986*  
*Income Tax Assessment Act 1936*  
*Industrial Chemicals (Notification and Assessment) Act 1989*  
*Industrial Relations Reform Act 1993*  
*Insurance Acquisition and Takeovers Act 1991*  
*Insurance Act 1993*  
*International War Crimes Tribunals Act 1995*  
*Judiciary Act 1903*  
*Jurisdiction of Courts (Cross-vesting) Act 1987*  
*Jurisdiction of Courts (Miscellaneous Amendments) Act 1987*  
*Lands Acquisition Act 1989*  
*Life Insurance Act 1995*  
*Liquid Fuel Emergency Act 1984*  
*Migration Act 1958*  
*Moomba-Sydney Pipeline System Sale Act 1994*  
*Motor Vehicle Standards Act 1989*  
*National Crime Authority Act 1984*  
*National Environment Protection Measures (Implementation) Act 1998*  
*National Health Act 1953*  
*National Measurement Act 1960*  
*Native Title Act 1993*  
*National Transmission Network Sale Act 1998*  
*Navigation Act 1912*  
*Nuclear Non-Proliferation (Safeguards) Act 1987*  
*Olympic Insignia Protection Act 1987*  
*Ombudsman Act 1976*  
*Ozone Protection Act 1989*  
*Patents Act 1990*  
*Payments Systems (Regulations) Act 1998*  
*Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990*  
*Petroleum Products Pricing Act 1981*  
*Petroleum Resource Rent Tax Assessment Act 1987*  
*Petroleum Retail Marketing Franchise Act 1980*  
*Petroleum Retail Marketing Sites Act 1980*  
*Petroleum (Submerged Lands) Amendment Act 1991*  
*Plant Breeder's Rights Act 1994*  
*Prices Surveillance Act 1983*  
*Privacy Act 1988*  
*Private Health Insurance Incentives Act 1997*  
*Protection of the Sea (Oil Pollution Compensation Fund) Act 1993*  
*Qantas Sale Act 1992*  
*Radiocommunications Act 1992*  
*Referendum (Machinery Provisions) Act 1984*  
*Removal of Prisoners (Territories) Act 1968*  
*Retirement Savings Account Act 1997*  
*Royal Commissions Act 1902*  
*Sales Tax Assessment Act (No 1) 1930*  
*Service and Execution of Process Act 1992*  
*Shipping Registration Act 1981*  
*Snowy Hydro Corporatisation Act 1997*  
*Space Activities Act 1998*  
*Superannuation Contributions Tax (Assessment and Collection) Act 1997*  
*Superannuation Industry (Supervision) Act 1993*  
*Superannuation (Resolution of Complaints) Act 1993*  
*Sydney Airport Demand Management Act 1997*  
*Sydney 2000 Games (Indicia and Images) Protection Act 1996*  
*Taxation Administration Act 1953*  
*Taxation (Unpaid Company Tax) Assessment Act 1982*  
*Taxation (Unpaid Company Tax-Promoters) Act 1982*  
*Taxation (Unpaid Company Tax-Vendors) Act 1982*  
*Telecommunications Act 1997*  
*Telecommunications (Consumer Protection and Service Standards) Act 1999*  
*Telecommunications (Interception) Act 1979*  
*Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*  
*Telstra Corporation Act 1991*  
*Termination Payments Tax (Assessment and Collection) Act 1997*  
*Trade Marks Act 1995*  
*Trade Practices Act 1974*  
*Treasury Bills Act 1914*  
*Wool International Privatisation Act 1999*  
*Workplace Relations Act 1996*  
*World Heritage Properties Conservation Act 1983*

Source: Federal Court of Australia Annual report 1999–2000, Appendix 4.



***Jurisdiction under s 39B(1A)(c) of the Judiciary Act***

2.141 In 1997 the Federal Court was given a general grant of jurisdiction in respect of matters ‘arising under any laws made by Parliament’ (s 39B(1A)(c) JA).<sup>130</sup> In 1999 this grant was qualified by the exclusion of criminal matters,<sup>131</sup> so that the section now reads:

The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter ...

- (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

2.142 Subject to the latter qualification, which is not germane to the Commission’s inquiry, the effect of the section is to expand the Federal Court’s jurisdiction from the Acts listed in Table 2 above to the entire field of federal law. While s 19(1) FCAA appears to contemplate that jurisdiction might be conferred on the Federal Court on an Act-by-Act basis, s 39B(1A)(c) JA removes the need for conferral of jurisdiction in this manner.

2.143 Section 39B(1A) was included in the *Judiciary Act* to give the Federal Court concurrent jurisdiction with state and territory courts in federal civil matters, and a greater role in the administration of federal laws ‘by ensuring that the Court is able to deal with all matters that are essentially federal in nature’.<sup>132</sup> Although not remarked on to any great extent, this provision appears to have furthered the conversion of the Federal Court from a court of specialised federal jurisdiction to one of general federal jurisdiction. While this new jurisdiction covers only a subset of the matters enumerated in sections 75 and 76 of the Constitution, it has significant potential to expand the role of the Federal Court in the administration of federal laws.

2.144 However, it should be recalled that jurisdiction under s 39B(1A)(c) JA is not invoked merely because the interpretation of a federal law is called into question. The High Court has held, in relation to the same language in s 76(ii) of the Constitution, that a matter arises under a law made by Parliament ‘if the right or duty in the matter owes its existence to Federal law or depends on Federal law for its enforcement’, but ‘does not extend to matters involving the interpretation of such statutes if they do not arise thereunder’.<sup>133</sup> In *Felton v Mulligan*,<sup>134</sup> for example, it

<sup>130</sup> *Law and Justice Legislation Amendment Act 1997* (Cth).

<sup>131</sup> *Law and Justice Legislation Amendment Act 1999* (Cth).

<sup>132</sup> *Law and Justice Legislation Amendment Bill 1997* Explanatory Memorandum, para 118.

<sup>133</sup> *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 76 CLR 141, 151, 154 (Latham J). See E Campbell ‘The accrued jurisdiction of the Federal Court in administrative law matters’ (1998) 17(2) *Australian Bar Review* 127, 139.

was held that a claim for enforcement of a deed executed by the applicant and her husband was not within federal jurisdiction because the right claimed arose from the deed, not from the *Matrimonial Causes Act 1959* (Cth). A matter arises under a law when ‘a right, title, privilege or immunity is claimed under that law’, meaning that is sourced in the law or can only be enforced by virtue of the law.<sup>135</sup>

***Relationship between specific statutes and s 39B(1A)(c)***

2.145 An important issue regarding the operation of s 39B(1A)(c), is whether it can be invoked to modify or expand the Federal Court’s jurisdiction in a matter raised pursuant to another federal Act which itself specifies the Federal Court’s jurisdiction.

2.146 In *Transport Workers Union v Lee*,<sup>136</sup> the applicant sought a declaration pursuant to s 170MT(2) of the *Workplace Relations Act 1996* (Cth), which provides that no cause of action lies in respect of certain ‘protected’ industrial actions. Among other defences, the respondent claimed that s 39B(1A)(c) operated to confer jurisdiction in a matter arising under another federal statute only if there is no impediment in that statute to pursuing that matter in the Federal Court. It was submitted that s 412 of the *Workplace Relations Act* was such an impediment as it provides exhaustively for the types of proceedings that may be brought before the Federal Court and does not include proceedings pursuant to s 170MT. However, Black CJ, Ryan and Goldberg JJ rejected that view, stating that

the point about s 39B(1A) is, however, that it operates according to its terms as a general conferral of jurisdiction ... in respect of matters arising under any laws made by the Parliament.<sup>137</sup>

2.147 The effect of this general operation, their Honours stated, was to avoid certain consequences of the prior system of limited Act-by-Act conferral of jurisdiction on the Federal Court. Their Honours referred in this regard to the judgment in *Kodak (Aust) Pty Ltd v Commonwealth*,<sup>138</sup> a case heard prior to the enactment of s 39B(1A) JA, in which Lockhart J held that the Federal Court did not have jurisdiction with respect to proceedings for the recovery of sales tax pursuant to s 12A(2) of the *Sales Tax Procedure Act 1934* (Cth). This was because the reference in s 12A to bringing a claim in a ‘Commonwealth or State Court of

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134 (1971) 124 CLR 367, 416 (Gibbs J). See also *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 540.

135 *James v South Australia* (1927) 40 CLR 1, 40.

136 (1998) 84 FCR 60.

137 *id.*, 67.

138 (1988) 22 FCR 197.

competent jurisdiction' was intended to include jurisdiction that is invested in the Federal Court from any other statutory source 'but is not itself an independent source of jurisdiction'.<sup>139</sup> The *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) was also inapplicable as the Federal Court did not receive cross-vested jurisdiction from the state Supreme Courts in federal matters that had been invested in the Supreme Courts by s 39(2) JA. Lockhart J described this consequence as a lacuna in the legislative schemes, which had attempted to avoid jurisdictional gaps between federal and state courts, and that 'it is for the Commonwealth to remove that lacuna by legislation'.<sup>140</sup> For the Court in *Transport Workers Union v Lee*, s 39B(1A) was just such a legislative amendment.

2.148 Similarly to *Transport Workers Union v Lee*, in *Hooper v Kirella Pty Ltd*,<sup>141</sup> the issue was whether the Federal Court had jurisdiction to make an order for preliminary discovery under O 15A FCR in a matter arising under the *Trade Practices Act*. The *Trade Practices Act* vests jurisdiction in the Federal Court under s 86 but only in a matter 'in respect of which a civil proceeding has been instituted under Part VI'. As proceedings had not been commenced under Part VI of the Act, s 86 could not operate to confer jurisdiction to make such an order. The Court noted that s 39B(1A)(c) does not confer on the Federal Court jurisdiction that has been 'expressly proscribed'.<sup>142</sup> However, it held that s 86 of the *Trade Practices Act* was a 'positive conferral', rather than a proscription, and could thus be extended by s 39B(1A). While s 86 'does not expressly advert to the possibility that a matter might arise under the *Trade Practices Act* otherwise than in the context of a proceeding instituted under Part VI', this did not amount to 'an expression of a legislative policy that ancillary procedures such as preliminary discovery should not be available in the Federal Court in matters arising under the *Trade Practices Act*'.<sup>143</sup> Wilcox, Sackville and Katz JJ stated

[b]y enacting s 39B(1A)(c) of the *Judiciary Act*, Parliament plainly intended to confer a broad supplementary jurisdiction on the Court in matters arising under laws made by the Parliament...It is difficult to think of any reason why Parliament would wish or intend to curtail the grant of general jurisdiction to the Court contained in s 39B(1A) so as to exclude jurisdiction to make orders in the nature of preliminary discovery in a matter arising under the *TP Act*.<sup>144</sup>

139 id, 202.

140 id, 203.

141 (1999) 167 ALR 358.

142 For example, by s 485 of the *Migration Act 1958* (Cth); see E Campbell 'The accrued jurisdiction of the Federal Court in administrative law matters' (1998) 17(2) *Australian Bar Review* 127, 139.

143 (1999) 167 ALR 358, 374.

144 *ibid*.

2.149 A variation on this issue occurred in *Rohner v Scanlan*<sup>145</sup> in which the applicants claimed that sections 5(1) and 26(1) of the *Sex Discrimination Act 1984* (Cth), together with s 47 of the *Human Rights and Equal Opportunities Commission Act 1986* (Cth), operated to invalidate Migration Regulation 1.15A(2)(a)(i), in respect of the migration of de facto spouses. An impediment was presented by s 485(1) of the *Migration Act 1958* (Cth) (inserted in 1992, prior to s 39B(1A) JA), which provides that

In spite of any other law, including section 39B of the Judiciary Act 1903, the Federal Court does not have any jurisdiction in respect of judicially-reviewable decisions or decisions covered by sub-section 475(2), other than the jurisdiction provided by this Part or by section 44 of the Judiciary Act 1903.

2.150 Drummond J held that, while the Federal Court did not have jurisdiction to hear this claim pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or s 39B(1) JA, it did *prima facie* have jurisdiction under s 39B(1A).

This question as to the validity of the migration regulation can, in my view, be characterised as a matter arising under both the *Sex Discrimination Act* and the *Human Rights and Equal Opportunities Commission Act* and therefore a matter within the original jurisdiction of this Court, by force of s 39B(1A) the *Judiciary Act*.<sup>146</sup>

2.151 His Honour held that, while s 485(1) of the *Migration Act* was worded so as to imply a wide operation, and could be construed as including amendments to s 39B such as subsection (1A), there were boundaries to its operation in respect of jurisdiction conferred by Acts other than the *Migration Act*. The wording of s 485(1) was not apt to deprive the Court of the jurisdiction it has under s 39B(1A) JA to make declarations as to the operation of the other federal Acts.

2.152 The effect of these decisions may have wide-ranging consequences. If *Judiciary Act* provisions are given an ambulatory operation by the courts, s 39B(1A)(c) may override those provisions of federal law that set out the Federal Court's jurisdiction in more limited terms. Section 39B(1A)(c) thus has the potential to recast the jurisdiction conferred upon the Federal Court in the Acts listed in Table 2. It may therefore be appropriate to review the jurisdiction conferred on the Federal Court under various federal laws to determine whether or not the effects of s 39B(1A) are intended.

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145 (1997) 77 FCR 433.

146 id, 436.

**Question 2.20.** What is the appropriate relationship between s 39B(1A)(c) of the *Judiciary Act*, the ambulatory provision in s 19 of the *Federal Court of Australia Act 1976* (Cth) and the sundry federal Acts that confer jurisdiction on the Federal Court? Should these jurisdictional provisions be collected in one place?

**Question 2.21.** Are the specific Acts that confer jurisdiction on the Federal Court still necessary in the light of s 39B(1A)(c)?

**Question 2.22.** To what extent does the jurisdiction conferred on the Federal Court by s 39B(1A)(c) extend or alter the jurisdiction that is expressly conferred under another federal Act?

**Question 2.23.** Should s 39B(1A)(c) be amended to provide that it applies unless expressly excluded or unless the Federal Court's jurisdiction is expressly proscribed under another federal Act?

## Associated jurisdiction

### *Purpose*

2.153 Section 32(1) FCAA provides that

To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked.

2.154 Some initial doubts were expressed about the meaning of the prefatory phrase, 'to the extent that the Constitution permits'. However, the High Court has held that the phrase refers to all the legislative power of the Commonwealth with respect to matters of federal jurisdiction, namely, all matters listed in sections 75 and 76 of the Constitution.<sup>147</sup>

2.155 The purpose of associated jurisdiction was to cure gaps in the Federal Court's jurisdiction that arose from the fact that the Court, historically, was conferred with jurisdiction under piecemeal legislation. Thus, if the Federal Court had been granted jurisdiction in matters arising under X Act, but not Y Act, the court, by virtue of

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<sup>147</sup> *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 494, 516, 538.

s 32 JA, would have jurisdiction to determine any matter arising under Y Act so long as it was ‘associated’ with a matter arising under X Act.

***Impact of s 39B(1A)(c) of the Judiciary Act***

2.156 The enactment of s 39B(1A)(c) significantly reduces the necessity for relying on the statutory doctrine of associated jurisdiction. As discussed above, the effect of s 39B(1A)(c) is to confer on the Federal Court jurisdiction in matters arising under nearly all federal laws. Section 39B(1A)(c) is thus broad enough to cover those cases that previously arose under laws not expressly within Federal Court jurisdiction but in respect of which the Federal Court would nevertheless have had jurisdiction to make determinations by virtue of its ‘associated jurisdiction’.

2.157 In some cases s 39B(1A)(c) will have a wider operation than s 32(1) FCAA. An example is the decision in *Coffey v Department of Social Security*.<sup>148</sup> In this case, the applicant was seeking review of a number of claims made against him pursuant to the *Social Security Act 1991* (Cth), including a claim for payment of a social security debt in respect of benefits wrongly paid. In that case, von Doussa, Branson and Sundberg JJ found that the Federal Court had no associated jurisdiction to review the claim as there was no other matter in which the Court’s jurisdiction had been properly invoked with which it might be said that the debt claim was associated. However, their Honours held that the entitlement of the appellant on which the debt was founded arose under the *Social Security Act 1991* (Cth), so the ‘debt claim [arose] under the Act for the purposes of s 39B(1A)(c)’.<sup>149</sup> The Court relied in part on *Federal Airports Corporation v Aerolineas Argentinas*,<sup>150</sup> in which recovery of a debt was also found to be within the jurisdiction conferred by s 39B(1A).<sup>151</sup>

2.158 However, s 32 FCAA may still capture some cases that are not covered by the extended jurisdiction conferred by s 39B(1A)(c) JA. This is because the additional jurisdiction conferred by the latter section falls wholly within s 76(ii) of the Constitution, whereas the associated jurisdiction conferred by the former section applies not only to s 76(ii) matters but also to any matter falling within sections 75 or 76 of the Constitution.

2.159 An example is provided by *Allied Mills Industries Pty Ltd v Trade Practices Commission*.<sup>152</sup> In that case the Trade Practices Commission (TPC) brought

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148 (1999) 86 FCR 434.

149 id, 442.

150 (1997) 147 ALR 649.

151 (1999) 86 FCR 434, 442.

152 (1981) 34 ALR 105. The example is drawn from B Opeskin, ‘Federal jurisdiction in Australia: Policies and prospects’ (1995) 46 *South Carolina Law Review* 765, 802.

proceedings in the Federal Court against Allied Mills for breach of s 45 of the *Trade Practices Act*. In the course of the proceedings a former manager of Allied Mills gave the TPC a number of commercially sensitive documents which the company wished to keep confidential. The company brought a cross-claim in which it sought to restrain the TPC from using or disclosing the information contained in the documents on the grounds that the TPC was acting tortiously and in breach of a duty of confidence. The question thus arose whether the Federal Court had jurisdiction over the cross-claim, given that it was founded on common law and equitable causes of action that were not generally within the Court's jurisdiction (including its accrued jurisdiction). The Federal Court held that it did have jurisdiction over the cross-claim because the cross-claim was 'associated' with the principal matter and was itself a federal matter. The TPC was an emanation of 'the Commonwealth' and the cross-claim was therefore a matter in which the Commonwealth was a party within the meaning of s 75(iii) of the Constitution. Such a claim could not have fallen within the Federal Court's jurisdiction as a result of s 39B JA because there has been no general conferral of jurisdiction on the Federal Court in matters in which the Commonwealth is a party.

2.160 In summary, the relationship between s 39B JA and the associated jurisdiction provision in s 32 FCAA is complex. There appears to be considerable overlap between the sections although each may operate in circumstances not covered by the other. Their relationship may merit legislative clarification.

**Question 2.24.** To what extent does s 39B(1A)(c) of the *Judiciary Act* remove the need for the Federal Court to rely on its associated jurisdiction pursuant to s 32 of the *Federal Court Act 1976* (Cth)? Should the relationship between the sections be clarified?

### Accrued jurisdiction

2.161 In addition to the legislative expansion of the Federal Court's jurisdiction, expansion of a different character has been developed by the courts through the doctrine of accrued jurisdiction. This doctrine allows the Federal Court, when hearing a federal matter, to decide any matter that would otherwise be non-federal but which forms an inseparable part of the one controversy. This jurisdiction accrues only where the non-federal claim arises from the same substratum of facts

as the federal claim and ‘only if the federal claim is a substantial aspect of that controversy’.<sup>153</sup>

2.162 The Federal Court’s jurisdiction does not extend to the non-federal claim if the federal claim is merely colourable, trivial, insubstantial or unarguable. However, jurisdiction over non-federal claims is not extinguished merely because the federal claim is dismissed on its merits. That is, even if a federal claim is dismissed by the Court, ‘it could not be seriously suggested that the dismissal of the claims under the [federal] Act had the effect of depriving the Court of jurisdiction to deal with any attached non federal claim’.<sup>154</sup> In practice, ascertaining the scope of the controversy can require complex analysis of factual and legal relationships.<sup>155</sup> Whether the various federal and non-federal claims can be said to arise from the same factual substratum

will sometimes be obvious but equally will sometimes be a matter of impression and degree. In the complex web of modern commercial transactions, the limits of the factual substratum may sometimes need to be arbitrarily drawn.<sup>156</sup>

2.163 Historically, Australian courts have treated accrued jurisdiction as a discretionary jurisdiction, which need not be exercised in all cases. More recently, the courts have resiled from that description. In *Re Wakim; Ex parte McNally*<sup>157</sup> Gummow and Hayne JJ stated that

[i]t may be that the better view is that the references to ‘discretion’ are not intended to convey more than that difficult questions of fact and degree will arise in such issues - questions about which reasonable minds may well differ.<sup>158</sup>

2.164 The task of drawing the boundaries of accrued federal jurisdiction is particularly complicated in circumstances where the federal claim is dismissed for want of jurisdiction. In such circumstances it might have been thought logical that jurisdiction in a related non-federal matter would be extinguished<sup>159</sup> as ‘there can be no accrued jurisdiction unless there are federal issues which that Court has

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153 *Fencott v Muller* (1983) 152 CLR 570, 610. An exercise of accrued jurisdiction is generally treated by courts as an exercise of federal rather than state jurisdiction. Compare *Edensor Nominees Pty Ltd v Australian Securities & Investments Commission* [2000] FCA 231 (9 March 2000), which is currently under appeal to the High Court.

154 *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 76 ALR 173, 181; *Klewer v Dutch* (2000) 99 FCR 217, 230.

155 *Fencott v Muller* (1983) 152 CLR 570, 608; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 303.

156 G Griffith & G Kennett ‘Judicial federalism’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000, 54.

157 (1999) 198 CLR 511.

158 id, 588.

159 E Campbell ‘The accrued jurisdiction of the Federal Court in administrative law matters’ (1998) 17(2) *Australian Bar Review* 127, 130.



jurisdiction to entertain'.<sup>160</sup> However, the cases do not clearly lead to this conclusion.<sup>161</sup> For example, in the context of the Federal Court's supervisory jurisdiction, the issue has frequently arisen where the Court's jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* has failed because the decision under review was not made under a federal enactment, and its jurisdiction under s 39(1) JA has failed because no respondent was a Commonwealth officer. In some of those cases, the Federal Court has denied the existence of, and declined to accept, accrued jurisdiction to deal with the remaining matters that would otherwise have been non-federal.<sup>162</sup> In other cases, the Federal Court has accepted accrued jurisdiction provided that the application was one of substance and not 'artificiality or subterfuge'.<sup>163</sup>

2.165 To the degree that it is derived from the High Court's constitutional conception of a 'matter', the scope of accrued jurisdiction is beyond legislative clarification. However, it is clear that judicial decisions as to how far the jurisdiction of the Federal Court should extend beyond purely 'federal' issues are made in the light of the competing considerations of 'the desirability of allowing the Federal Court to dispose of the entire issue and the (arguably legitimate) interests of the state courts'.<sup>164</sup> This issue is inherent in all provisions of the *Judiciary Act* that seek to draw jurisdictional boundaries around the various courts exercising federal judicial power. As put succinctly by Mason J in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*

[t]here is on the one hand the desirability of enabling the Federal Court to deal with attached claims so as to resolve the entirety of the parties' controversy. There is on the other hand an apprehension that if it be held that the Federal Court has jurisdiction to deal with attached claims, State Courts will lose to the Federal Court a proportion of the important work which they have hitherto discharged, work which the Federal Court has no jurisdiction to determine if it be not attached to a federal claim.<sup>165</sup>

2.166 Mason J went on to point out that this apprehension is exacerbated by the vesting of exclusive federal jurisdiction in the Federal Court, in such provisions as s 86 of the *Trade Practices Act*. It is also the case that the broader the Federal

160 *Carlton & United Breweries Ltd v Castlemaine Tooheys Ltd* (1986) 161 CLR 543, 553.

161 *Moorgate Tobacco Co Ltd v Philip Morris* (1980) 145 CLR 457, 477.

162 *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 127 ALR 580; *Vietnam Veterans' Affairs Association of Australia (NSW Branch) Inc v Alex Cohen & Ors* (1996) 70 FCR 449.

163 *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563, 564–5; *New South Wales Aboriginal Land Council v ATSIC* (1995) 131 ALR 559, 572–573; *Buck v Comcare* (1996) 137 ALR 335.

164 G Griffith & G Kennett 'Judicial federalism' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 54.

165 (1981) 148 CLR 457, 513.

Court's jurisdiction under federal laws, the more likely it is that matters that would otherwise have been non-federal will be attached to and not severable from the expanded range of federal claims. The enactment of s 39B(1A) JA may therefore also have repercussions for the accrued jurisdiction of the Federal Court.<sup>166</sup>

### **Policy issues**

2.167 As discussed above, the Federal Court was conceived as a 'small court', with jurisdiction in respect of specialised areas of federal law. The expansion of the Federal Court's jurisdiction to include matters arising under a host of federal laws, and the subsequent enactment of s 39B(1A) importing the jurisdictional breadth of s 76(ii) of the Constitution, suggest that this original conception may no longer be an accurate description of the function of the Court. The breadth of the Federal Court is also evidenced by its appellate jurisdiction in criminal matters arising in certain territories, and its possible jurisdiction over common law matters arising in the ACT and the Northern Territory (see Chapter 7). Over time, the Federal Court has thus developed the character of a 'big court' or a court of broad federal jurisdiction.

2.168 A policy issue underlying the above discussion is whether the Federal Court should be given general jurisdiction over federal matters — one which clarifies the relationship between s 39B(1A) and other Acts conferring federal jurisdiction; which addresses the gaps and exceptions in the legislation; and which includes those additional matters falling within sections 75 and 76 of the Constitution, which might appropriately be dealt with by the Federal Court.

2.169 Some insight into the policies underpinning the Federal Court's jurisdiction can be gained by considering the parliamentary debates leading to the creation of the Federal Court, and the explanatory memoranda surrounding the enactment of s 39B(1) JA and its subsequent amendments. As mentioned above (see paragraphs 2.7–2.8, 2.176), when the Bill to create the Federal Court was before the House of Representatives in 1976, the Attorney-General stated that the 'government believes that only where there are special policy or perhaps historical reasons for doing so should original jurisdiction be vested in a federal court'.<sup>167</sup> Clearly, the Federal Court as a court of general federal jurisdiction was beyond the contemplation of government at that time.

2.170 When s 39B(1A) was enacted in 1997 it was described as being necessary to give the Federal Court jurisdiction in all 'essentially federal' matters, commensurate

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<sup>166</sup> In relation to administrative law claims, see E Campbell 'The accrued jurisdiction of the Federal Court in administrative law matters' (1998) 17 *Australian Bar Review* 127, 134.

<sup>167</sup> *Hansard* (H of R) 21 October 1976, 2111.

with those of the states.<sup>168</sup> In his second reading speech before the House of Representatives, the Commonwealth Attorney-General described s 39B(1A) briefly as ‘providing the Federal Court with jurisdiction under sections 75 and 76 of the Constitution’,<sup>169</sup> and this was later described by the Opposition as an ‘uncontroversial’ amendment.<sup>170</sup> Indeed, there was no debate on s 39B(1A), which is surprising considering the impact that the amendment has had on the Federal Court’s jurisdiction. It may be that the earlier reticence to give broad federal jurisdiction to the Federal Court has now been replaced by support for such a jurisdiction. The subsequent amendments to s 39B(1A) have been directed to excluding the conferral of criminal jurisdiction on the Federal Court, and seem similarly uncontroversial.<sup>171</sup>

**Question 2.25.** Should the Federal Court be a court exercising general federal jurisdiction? If so, what effect is this likely to have on the role and status of state courts?

**Question 2.26.** Should additional federal jurisdiction be conferred on the Federal Court in any section 75 and 76 matters not already within its jurisdiction? For example, should its jurisdiction be extended to matters in which the Commonwealth is a party, within the meaning of s 75(iii) of the Constitution?

## Original jurisdiction of the Family Court

2.171 The Family Court was created in 1975 by the *Family Law Act 1975* (Cth). The original jurisdiction of the Family Court and of other courts exercising jurisdiction in relation to family law is primarily set down in the *Family Law Act*. The Court also has jurisdiction under the *Child Support (Registration and Collection) Act 1988* (Cth), the *Child Support (Assessment) Act 1989* (Cth), and the *Marriage Act 1961* (Cth). Unlike the Federal Court, the Family Court’s original jurisdiction is not dealt with by the *Judiciary Act*. Consequently, the Commission’s preliminary view is that the allocation of original jurisdiction to the Family Court is

<sup>168</sup> *Law and Justice Legislation Amendment Bill 1997* Explanatory Memorandum, para 118.

<sup>169</sup> *Hansard* (H of R) 12 December 1996, 8352.

<sup>170</sup> *Hansard* (H of R) 26 February 1997, 1463.

<sup>171</sup> *Law and Justice Legislation Amendment Act 1999* (Cth) sch 10, amending subsection (b). See also *Jurisdiction of Courts Legislation Amendment Bill 2000*, Sch 2 proposing the addition of s 39B(1B), (1C) and (1D).

not central to this inquiry. However, there are some aspects of family law jurisdiction that deserve brief mention.

- ?? The transfer of matters within the Family Court and between that Court and other courts exercising federal jurisdiction impacts of the efficiency of the federal judicial system as a whole. These matters are discussed in Chapter 3.
- ?? Jurisdiction with respect to family law is exercised by state courts as well as by the Family Court. In Western Australia this is done through the Family Court of Western Australia and in other states through the use of state magistrates. These matters are discussed in Chapter 4.
- ?? As mentioned above, the accrued jurisdiction of the Federal Court has been cast broadly. The High Court has accepted that the Family Court may also exercise accrued jurisdiction, but it appears to have taken a rather more restrictive view of the ambit of the accrued jurisdiction of the Family Court.<sup>172</sup> However, this constitutional matter is not amenable to legislative reform.
- ?? One issue that arises in respect of the Family Court's original jurisdiction is whether it should be expanded beyond the confines of the *Family Law Act* and related legislation. As noted above, the original jurisdiction of the Federal Court has been significantly expanded by the enactment of s 39B(1A)(c) JA. The Commission is interested in hearing views about whether there should be an expansion of the Family Court's jurisdiction to enable it to deal with other matters that arise in the course of family law proceedings, such as bankruptcy.

2.172 The appellate jurisdiction of the Family Court and the jurisdiction of other courts to hear appeals from the Family Court do raise important issues for this inquiry. These issues are discussed below in Chapter 4.

**Question 2.27.** Should the original jurisdiction of the Family Court be expanded to other matters arising under laws made by the Parliament? If so, how and to what extent?

## State courts exercising federal jurisdiction

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<sup>172</sup> *Smith v Smith* (1986) 161 CLR 217.

## Introduction

2.173 Section 77(iii) of the Constitution confers power on the Parliament to make laws ‘investing any court of a State with federal jurisdiction’ with respect to any of the matters mentioned in sections 75 and 76. Since 1903 this power has been used to conscript state courts in the exercise of the judicial power of the Commonwealth. The High Court once described this facility as an ‘autochthonous expedient’,<sup>173</sup> that is, an expedient that is indigenous or home grown. This description was not wholly accurate, but it emphasised the importance attached to the role of state courts in the federal judicial system as a matter of both history and practice.

2.174 In many respects, Chapter III of the Australian Constitution was modelled on Article III of the United States Constitution. However, the express constitutional authority to invest state courts with federal judicial power, which is found in s 77(iii), has no direct counterpart in the United States.<sup>174</sup> The drafters of the United States Constitution had contemplated the idea of directly authorising state courts to adjudicate federal causes but this possibility was rejected. In the words of Alexander Hamilton, the ‘prevalency of a local spirit’ disqualified local tribunals from jurisdiction over ‘national causes’.<sup>175</sup> In addition, the composition of some state courts was thought to make them ‘improper channels of the judicial authority of the Union’. This was because state judges who held office ‘during pleasure’ lacked the independence required ‘for an inflexible execution of the national laws’.

2.175 By contrast, in Australia the use of state courts was perceived to be central to the exercise of federal jurisdiction from the time of federation. Cowen and Zines suggest that the device of investing state courts with federal jurisdiction was seen as economical, particularly given Australia’s small population and vast distance.<sup>176</sup> However, in their view, the departure from the United States model was also linked to the Australian willingness to accept a more unified judicial system. They claim that the large field of original jurisdiction conferred directly on the High Court by s 75 of the Constitution and the potential for that jurisdiction to be expanded under s 76 was ‘most sensibly explained on the assumption that the Founding Fathers believed that the High Court would in all probability be the only general federal court’.<sup>177</sup> Quick and Garran, writing in 1901, confirm the constitutional drafters’

173 *R v Kirby; Ex parte the Boilermakers’ Society of Australia* (1956) 94 CLR 254, 268.

174 However, the United States Supreme Court has held that the supremacy clause in Art VI, cl 2 requires state courts to exercise federal jurisdiction in certain circumstances. See eg *Testa v Katt* 330 US 386 (1947); *Printz v United States* 521 US 98 (1997).

175 A Hamilton *The Federalist* No 81.

176 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 175.

177 id, 175–6.

limited expectations of the role of federal courts and the consequent reliance on state courts for the exercise of federal jurisdiction.

[I]t is probable that for some time there will be no necessity for the creation of any inferior federal courts, but that all the cases in which the original jurisdiction of the Commonwealth is invoked can be dealt with either by the High Court itself or by Courts of the States.<sup>178</sup>

2.176 In *Re Wakim; Ex parte McNally*, Callinan J cited the following passage from a speech by Mr Ellicott QC to the House of Representatives in 1974 regarding the founders' views about the use of state courts.

It was said of this proposal to vest federal jurisdiction in state courts that the object was 'to avoid the needless creation of federal courts in all the states and the consequent degradation of state courts and avoid the difficulties of litigation which exists [sic] in America'. They regarded the power to establish federal courts, more by way of reserve if any state should close its courts or obstruct the determination of federal matters. The use of state courts was therefore seen by the founding fathers as a means of maintaining a simple court system within the Federation with the High Court as the supreme court of Australia. The founding fathers obviously saw the creation of Federal courts as unnecessary except in the last resort.<sup>179</sup>

2.177 In *Re Wakim; Ex parte McNally*, Kirby J commented as follows.

There are many reasons why s 77(iii) provides as it does. Most of them are historical. The state (formerly colonial) courts were well established at the time of federation. There were no federal courts at that time. Indeed there were few federal courts until the 1970s. Until the 1980s their jurisdiction was very limited. The provision of power compulsorily to invest the established state courts with federal jurisdiction was therefore an urgent necessity. It was so if the new Commonwealth, with its limited resources, were to avoid the burdensome obligation of creating a parallel federal judiciary such as had been established in the United States of America. In that country, the uneven quality and varying methods of appointment of the judiciary of the states had resulted in the growth of a substantial and separate federal judiciary. By way of contrast, the Australian colonial (and later state) judiciaries exhibited uniformly high standards of integrity and ability rendering the 'autochthonous expedient' particularly suitable to Australia's initial federal judicial arrangements.<sup>180</sup>

2.178 Since 1903, great reliance has been placed on state courts in exercising federal jurisdiction. The exercise of federal criminal jurisdiction is still overwhelmingly the province of state courts. In relation to civil matters, since the

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178 J Quick & R Garran *Annotated Constitution of the Australian Commonwealth* 1901 Legal Books Sydney reprinted 1976, 726.

179 (1999) 198 CLR 511, 621–2 (Callinan J), citing RJ Ellicott QC *Hansard* (H of R) 24 July 1974.

180 id., 605.

1970s federal courts have begun to exercise jurisdiction in a broader range of federal matters. Yet state courts continue to play a significant role in federal civil matters.

### The ambit of federal power

2.179 In *Re Wakim; Ex parte McNally*, Gleeson CJ stated that ‘the autochthonous expedient of conferring federal jurisdiction on state courts is sustained, not by its expediency, but by a specific grant of legislative power’.<sup>181</sup> The ability of the Commonwealth Parliament to regulate the exercise of federal jurisdiction by state courts is thus dependent on the scope of the power granted and the impact of any constitutional limitations on that power (as to the latter, see paragraphs 2.188-2.211).

2.180 The power conferred by s 77(iii) of the Constitution has been described as the ‘sole source of power to confer Federal jurisdiction on state courts’,<sup>182</sup> and it covers both original and appellate jurisdiction.<sup>183</sup> Consistently with general principles of constitutional interpretation it can be said that

- ?? the grant of power in s 77(iii) is broadly construed
- ?? the power conferred by s 77(iii) carries with it whatever is necessary to make that power effective (the ‘implied incidental power’), and
- ?? the power is supplemented by the express power in s 51(xxxix) of the Constitution to make laws with respect to matters incidental to the execution of powers vested in the Parliament under Chapter III.

2.181 Specifically, it has been held that the power in s 77(iii) to confer federal jurisdiction on a state court carries with it power to ‘regulate the procedure and control the method and extent of relief’.<sup>184</sup> As Dawson J has remarked

[u]nder s 79 Parliament may prescribe the number of judges to exercise federal jurisdiction. And clearly Parliament may extend the jurisdiction of the court because that is precisely what s 77(iii) envisages. Also it may regulate the practice and procedure which the state court is to follow in exercising the invested jurisdiction. But it may go no further than is necessary for that purpose; it may not legislate with respect to the court itself.<sup>185</sup>

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181 id, 540.

182 *Russell v Russell* (1976) 134 CLR 495, 517; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 556 citing *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 586.

183 *Ah Yick v Lehmert* (1905) 2 CLR 593. As to appellate jurisdiction, see Ch 4.

184 *Lorenzo v Carey* (1921) 29 CLR 243, 253, citing *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1145 (Isaacs J).

185 *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51, 82 (Dawson J).

2.182 When the Commonwealth Parliament invests federal jurisdiction in a state court, it can thus impose limitations and restrictions upon this jurisdiction. In *Ex parte Walsh and Johnson; In re Yates*, Higgins J held that ‘the Parliament has power under sec 77(iii), in investing any Court of a state with Federal jurisdiction, to define the limits or conditions of the investiture’.<sup>186</sup>

### **Policy framework**

2.183 The investiture of federal jurisdiction in state courts raises fundamental issues of policy. In particular, there is the question of the extent to which the Commonwealth should attempt to prescribe the manner in which state courts exercise federal jurisdiction. On one view, the Commonwealth should accept state courts as it finds them when exercising federal jurisdiction. This is based in part on the idea that state courts provide a service to the federal government when they exercise federal jurisdiction, even though they are constitutionally bound to do so. This service enables federal jurisdiction to be exercised without the federal government shouldering the financial and administrative burden of providing a panoply of federal courts to adjudicate those matters.

2.184 This view is illustrated by the following quotation from an early High Court case on s 77(iii).

The Constitution, by Chapter III, draws the clearest distinction between federal Courts and State Courts, and while enabling the Commonwealth Parliament to utilise the judicial services of State Courts recognises in the most pronounced and unequivocal way that they remain ‘State Courts’.<sup>187</sup>

2.185 An alternative view is that it is legitimate and indeed desirable for the Commonwealth to seek to ensure that federal jurisdiction is applied uniformly in all Australian courts, whether federal or state. The Commonwealth thus has a significant interest in the quality of the exercise of federal jurisdiction, including factors such as accessibility, fairness, efficiency, effectiveness, and consistency in treatment and outcome.

2.186 Currently, data are lacking about the exercise of federal jurisdiction by state courts. These data may be necessary to provide informed debate about potential changes to established arrangements. For example, there are no detailed national statistics on the extent of the use of state magistrates’ courts for family law

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<sup>186</sup> (1925) 37 CLR 36, 125.

<sup>187</sup> *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437, 452 (Isaacs J).



matters.<sup>188</sup> It does not appear to be possible at present to ascertain with accuracy the extent to which state courts exercise federal jurisdiction in civil matters. Useful information would include data about the numbers and types of cases, costs, outcomes, procedures used, and the extent to which any differences between states leads to inconsistency or inefficiency. The collection and analysis of such information could be one aspect of assessing the state courts' optimal role in exercising federal jurisdiction.

2.187 There is little doubt that the regulation of state courts in exercising federal jurisdiction can raise political and fiscal sensitivities between the Commonwealth and the states, and between their respective court systems. The Commission is interested in receiving comments on whether any substantial change to the current arrangements for the exercise of federal jurisdiction by state courts is desirable. Much of the following discussion relates to specific aspects of these broader policy issues.

### **Constitutional limitations on investing state courts with federal jurisdiction**

2.188 Although the power to confer federal jurisdiction on state courts is broadly construed, it is nonetheless subject to important constitutional constraints. These constraints are not apparent in the express words of the Constitution, but have been implied from the structure and function of Chapter III. This section discusses three limitations, each of which poses an important check on the legislative power of the Commonwealth Parliament. These limitations are that

- ?? the structure and organisation of state courts must be preserved
- ?? only judicial power can be invested in state courts, and
- ?? federal jurisdiction must be invested in a state body that satisfies the description of a 'court'.

2.189 In addition, this section considers the impact of the High Court's decision in *Kable v Director of Public Prosecutions (NSW)*<sup>189</sup> on the exercise of federal judicial power by state courts.

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188 Australian Law Reform Commission & Human Rights and Equal Opportunity Commission Report 84 *Seen and heard: Priority for children in the legal process* Sydney 1997, para 15.62 (ALRC 84).

189 (1997) 189 CLR 51.

***Preserving the structure and organisation of state courts***

2.190 Generally speaking, when the Commonwealth invests state courts with federal jurisdiction it must accept those courts in the form in which the states have created them. In *Le Mesurier v Connor* the High Court said

[t]he [Commonwealth] Parliament may create Federal Courts, and over them and their organization it has ample power. But the Courts of a state are the judicial organs of another Government. They are created by state law; their existence depends upon state law; that law at least, determines the constitution of the court itself and the organization through which its powers and jurisdictions are exercised.<sup>190</sup>

2.191 The Court also said in that case that the power in s 77(iii) is limited to ‘confer[ing] additional judicial authority upon a Court fully established by or under another legislature’.<sup>191</sup> Section 77(iii) allows the Commonwealth Parliament to ‘clothe’ a state court with federal jurisdiction but not to ‘affect or alter the constitution of the Court itself or...the organization through which its jurisdiction and powers are exercised’.<sup>192</sup> To do so would be to

go outside the limits of the power conferred and to seek to achieve a further object, namely, the regulation or establishment of the instrument or organ of Government in which judicial power is invested, an object for which the Constitution provides another means, the creation of Federal Courts.<sup>193</sup>

2.192 There are two exceptions to the principle that the Commonwealth has no power to regulate the composition, structure or organisation of state courts when they are exercising federal jurisdiction. The first is where such regulation is incidental to the grant of power to confer federal jurisdiction. Thus, it has been held that conferral of jurisdiction over bankruptcy and matrimonial causes includes all powers appropriate to that jurisdiction and ‘all authority incidental to the exercise of such powers’.<sup>194</sup> The second exception is Parliament’s express power under s 79 of the Constitution to prescribe the number of judges who are to exercise federal jurisdiction in any court.

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190 (1929) 42 CLR 481, 495–6.

191 id, 496.

192 *Russell v Russell* (1976) 134 CLR 495, 516 (Gibbs J).

193 *Le Mesurier v Connor* (1929) 42 CLR 481, 496. See also *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 61 (Mason J).

194 *Bond v George A Bond Co Ltd* (1930) 44 CLR 11, 22 (Rich and Dixon JJ); *Kotsis v Kotsis* (1970) 122 CLR 89 (Menzies J).

2.193 The cases reveal several examples of things the Commonwealth cannot do in relation to state courts exercising federal jurisdiction. This includes prescribing a mode of trial that does not exist under the relevant state law<sup>195</sup> and making Commonwealth registrars part of the organisation of a state court.<sup>196</sup>

2.194 An instructive example of the differences drawn between valid and invalid Commonwealth regulation of state courts is provided by *Russell v Russell*.<sup>197</sup> In that case a majority of the High Court (Barwick CJ, Gibbs and Stephen JJ) held that s 97(1) FLA was invalid in so far as it provided that all proceedings in state courts exercising federal jurisdiction under the Act shall be heard in closed court. However, a different majority (Stephen, Mason and Jacobs JJ) held that s 97(4) FLA was a valid law under s 77(iii) of the Constitution in so far as it provided that neither the judge hearing the proceedings nor counsel shall robe.

2.195 In relation to the latter provision, Stephen J, who was the only justice common to both majorities, said

[t]he requirement that robes should be worn does not, in my view, touch upon the constitution or organization of a court...The widespread, if not universal, absence in Australian jurisdictions of any specification, statutory or otherwise, of what robes shall be worn is indicative of how far removed is this topic from matters affecting the constitution of Supreme Courts.<sup>198</sup>

2.196 However, Stephen J was of the view that the former provision (s 97(1)) was ‘concerned not with mere curial dress but with a matter of great substance, the concept of the hearing in open court’. His Honour said

a tribunal which as of course conducts its hearings in closed court is not of the same character as one which habitually conducts its proceedings in open court.<sup>199</sup>

2.197 The limits on the power of federal Parliament to regulate proceedings in state courts invested with federal jurisdiction are not completely resolved. There are many possibilities in relation to a court’s composition, structure and organisation, and the test invoked by the High Court is inherently flexible. It may sometimes be difficult to distinguish laws that alter the ‘character’, ‘composition’, ‘constitution’, ‘structure’ or ‘organisation’ of a court from those that amount to permissible regulation of practice and procedure, jurisdiction and remedies in those courts. The

195 *Brown v The Queen* (1986) 160 CLR 171, 199–200 (Brennan J).

196 *Le Mesurier v Connor* (1929) 42 CLR 481; *Peacock v Newtown Marrickville & General Co-Operative Building Society No 4 Ltd* (1943) 67 CLR 25, 37 (Latham CJ).

197 (1976) 134 CLR 495.

198 id, 531.

199 id, 532.

cases that have considered the issue have generally confined themselves to the circumstances at hand without developing detailed criteria.<sup>200</sup>

***Only judicial power may be invested***

2.198 A second constitutional limitation is that the Commonwealth Parliament cannot confer non-judicial functions on state courts, despite the fact that states do not have a strict separation of powers. In *Queen Victoria Memorial Hospital v Thornton*,<sup>201</sup> the High Court had to consider whether the Court of Petty Sessions in Melbourne was validly invested with federal jurisdiction under the *Re-establishment and Employment Act 1945* (Cth). The Act established a regime for giving preference in employment to persons who had undertaken military service during the Second World War. The Act empowered a state magistrate to make an order directing an employer to engage a person who was entitled to preference under the Act.

2.199 The High Court had little difficulty in finding that the function conferred on the magistrate was administrative and not judicial. There was no antecedent right that the court of summary jurisdiction was called upon to ascertain, examine or enforce. The High Court went on to hold that the classification of the magistrate's function as non-judicial was fatal to the investiture of federal jurisdiction in the state court of summary jurisdiction. The Court said that the power of the Commonwealth Parliament to impose duties upon state courts or to invest them with federal functions is defined by s 77 and 79 of the Constitution. The Court approved the conclusion of Latham CJ in *Federal Council of the British Medical Association in Australia v Commonwealth* that

[t]here is no provision in the Constitution which enables the Commonwealth Parliament to require state courts to exercise any form of non-judicial power.<sup>202</sup>

2.200 The Court's conclusion in *Queen Victoria Memorial Hospital v Thornton* was itself approved in *R v Davison*,<sup>203</sup> by Dixon CJ and McTiernan J and in *Gould v Brown* by Brennan CJ and Toohey J.<sup>204</sup>

***Federal jurisdiction must be invested in a court***

2.201 Under s 77(iii) of the Constitution, the federal jurisdiction that may be conferred by Parliament must be invested in 'any court of a state'. As a result,

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200 id, 519 (Gibbs J).

201 (1953) 87 CLR 144.

202 (1949) 79 CLR 201, 236.

203 (1954) 90 CLR 353, 367–368.

204 (1998) 193 CLR 346, 388.

Parliament cannot invest federal jurisdiction in bodies that do not satisfy that constitutional description. The High Court's interpretation of that term has undergone considerable change.

2.202 In *Kotsis v Kotsis*<sup>205</sup> the High Court held that a registrar of the Supreme Court of New South Wales did not have power to make an order for payment of interim costs in a matrimonial cause (which was a matter within federal jurisdiction) because the registrar was not a member of 'the court'. Similarly, in *Knight v Knight*<sup>206</sup> the High Court had held that jurisdiction over matrimonial causes could not be exercised by a master of the Supreme Court of South Australia because 'the Court' consisted only of judges and not masters. As a result, a master could not exercise federal jurisdiction invested in the state court. These decisions were based on a traditional distinction between judges and officers forming part of the court organisation.<sup>207</sup>

2.203 In *Commonwealth v Hospital Contribution Fund*,<sup>208</sup> the High Court overruled these decisions on the basis that they were contrary to the principles espoused in *Le Mesurier v Connor*<sup>209</sup> and other cases discussed above. In Gibbs J's view, 'to exclude the officers of a state court, who regularly exercise its powers, from the investiture of federal jurisdiction' and to 'require the state courts to depart from their established organization in dealing with matters of federal jurisdiction' was disadvantageous to the cause of justice.<sup>210</sup>

2.204 In *Commonwealth v Hospital Contribution Fund*, a 'court' was defined for the purposes of s 77(iii) of the Constitution as 'an organization for the administration of justice, consisting of judges and with ministerial officers having specified functions'.<sup>211</sup> It was further held that, in exercise of s 77(iii), federal jurisdiction is 'conferred on the court regarded as an entity, rather than on the individual persons who compose its membership'.<sup>212</sup> Consequently, the jurisdiction and powers of the court as an entity do not cease to exist because they are exercised by an officer of the court rather than by a judge. Accordingly, in this case, a master of the Supreme Court of New South Wales was able to exercise the Court's federal jurisdiction.

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205 (1970) 122 CLR 69.

206 (1971) 122 CLR 114.

207 *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 61 (Mason J).

208 (1982) 150 CLR 49.

209 (1929) 42 CLR 481.

210 (1982) 150 CLR 49, 58 (Gibbs J). For the principles governing the delegation of federal judicial power to court officers in federal courts see *Harris v Caladine* (1991) 172 CLR 84.

211 (1982) 150 CLR 49, 58 (Gibbs J), citing Windeyer J in *Kotsis v Kotsis* (1970) 122 CLR 69, 91.

212 (1982) 150 CLR 49, 58 (Gibbs J).

2.205 Despite the breadth now given to the concept of ‘State courts’ as recipients of federal jurisdiction, some situations may nevertheless fall foul of the constitutional requirement in s 77(iii). In *Newman v A*,<sup>213</sup> the Supreme Court of Western Australia considered the principles in *Commonwealth v Hospital Contribution Fund*, together with s 39(2)(d) JA, which limits the class of persons who may exercise federal jurisdiction summarily. The Court found that a ‘children’s panel’ established pursuant to the *Child Welfare Act 1947* (WA) could not exercise federal jurisdiction. Murray J noted that, in order for a delegated power to be valid, it was necessary for federal jurisdiction to be exercised by a court invested with that jurisdiction, ‘rather than in a process by which the exercise of federal jurisdiction is effectively transferred away from a body, which may properly be described as a court, into some other hands’.<sup>214</sup>

### ***The impact of Kable***

2.206 In *Kable v Director of Public Prosecutions (NSW)*,<sup>215</sup> the High Court appears to have unsettled the conventional understanding of the position of the state courts in the federal judicial system. The case did not directly concern the power of the federal legislature to invest state courts with federal jurisdiction. However, the reasoning in the case may have implications for that situation, and thus repays further consideration.

2.207 In *Kable*, the constitutional validity of the *Community Protection Act 1994* (NSW) was called into question. The Act empowered the Supreme Court of New South Wales to make an order to detain a convicted criminal, Kable, in custody after the expiration of his sentence. The Act had been passed by the New South Wales Parliament in response to the threat that Kable allegedly posed to the New South Wales community. A majority of the High Court held that the powers conferred on the Supreme Court were non-judicial and that those powers were ‘incompatible’ with that Court’s position as a recipient of federal judicial power.<sup>216</sup>

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213 (1992) 16 Fam LR 209.

214 id, 211.

215 (1997) 189 CLR 51.

216 Gaudron, Toohey, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting.

2.208 It is important to note that this case did involve the exercise of federal jurisdiction — the invocation of Chapter III of the Constitution as a ground of alleged invalidity of the state Act brought the matter within s 76(i) of the Constitution. Despite this, it is clear that Gaudron, McHugh and Gummow JJ in the majority did not base their reasoning on that fact, and similar principles would have applied had the court been exercising state jurisdiction. In short, their Honours articulated a constitutional limitation on the powers of state parliaments to invest their own courts with jurisdiction that is incompatible with the courts' role under Chapter III of the Constitution. On the other hand, Toohey J, who also formed part of the majority, did not extend the new principle beyond situations in which a state court exercises federal judicial power, stating clearly that the Constitution 'does not impose the requirements of Ch III on a State court exercising State jurisdiction'.<sup>217</sup>

2.209 Gaudron, McHugh and Gummow JJ, who formed the majority with Toohey J, spoke of state courts as being significant components of an 'integrated' Australian judicial system.<sup>218</sup> As Kirby J described it in a later case, this unified system is derived in part from the autochthonous expedient, 'with its express recognition of the Supreme Courts and of the other courts of the states, as potential recipients of federal jurisdiction and as participants in the integrated appellate structure of the Australian court system'.<sup>219</sup> Affirming the unity of the federal judicial system, whereby the states must maintain a system of courts available for the vesting of federal jurisdiction, the majority in *Kable* held that a weak form of the separation of powers doctrine existed at the state level, by implication from Chapter III of the Constitution. As noted by McHugh J in *Re Wakim; Ex parte McNally*, this was an exceptional situation as

the Constitution's doctrine of separation of powers has nothing to say about the separation of the legislative, executive or judicial powers of the states, except in those rare situations exemplified by *Kable v Director of Public Prosecutions (NSW)*. State courts can and do exercise many non-judicial powers that are compatible with those courts being invested with federal jurisdiction.<sup>220</sup>

2.210 The unity of the federal judicial system results in limitations being placed upon state legislative power. Any state law that grants to a state court functions that are incompatible with the exercise of the judicial power of the Commonwealth is invalid.<sup>221</sup> In *Kable*, the majority assessed the compatibility of the non-judicial functions conferred upon the Supreme Court by the *Community Protection Act*

217 (1997) 189 CLR 51, 94.

218 id, 102–103 (Gaudron J), 112–114 (McHugh J), 137–139 (Gummow J). Also see P Johnston & R Hardcastle 'State courts: The limits of *Kable*' (1998) 20 *Sydney Law Review* 216, 219.

219 *Gould v Brown* (1998) 193 CLR 346, 479.

220 (1999) 198 CLR 511, 560.

221 (1997) 189 CLR 51, 104 (Gaudron J).

1994 (NSW) and, while different formulations for a test of incompatibility were devised, it was the underlying concern to maintain public confidence in the independence of state courts as recipients of federal jurisdiction that rendered the Act invalid.<sup>222</sup>

2.211 The dissenting judgments of Brennan CJ and Dawson J relied upon the principle that the Commonwealth must take state courts as it finds them. As such, while state courts may be invested with judicial power by the Commonwealth, they are primarily state institutions.<sup>223</sup> However, it has been suggested that the majority's 'integrated' approach largely addressed these concerns. The Commonwealth Parliament must take state courts as it finds them, but the latter are required to conform to their intended role under Chapter III of the Constitution.<sup>224</sup>

**Question 2.28.** To what extent may the Commonwealth Parliament dictate the practice and procedure of a state court exercising federal jurisdiction without invalidly altering the structure and organisation of the court?

### **Federal jurisdiction conferred by s 39 of the *Judiciary Act***

2.212 The principal provision conferring federal jurisdiction on state courts is s 39 JA. Section 39 states

- (1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.
- (2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions ...

2.213 Section 39 seeks to achieve its purpose through a circuitous two-step process. First, s 39(1) makes 'the jurisdiction of the High Court' exclusive of the jurisdiction of the several courts of the states. This was an exercise of the power in s 77(ii) of the Constitution to 'define the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States'. The reference in s 39(1) to 'the jurisdiction of the High Court' was presumably

222 P Johnston & R Hardcastle 'State courts: The limits of Kable' (1998) 20 *Sydney Law Review* 216, 231.

223 (1997) 189 CLR 51, 67 (Brennan CJ), 81–82 (Dawson J).

224 P Johnston & R Hardcastle 'State courts: The limits of Kable' (1998) 20 *Sydney Law Review* 216, 220.



intended to refer to the matters listed in s 75 of the Constitution, in which jurisdiction was conferred directly on the High Court by force of the Constitution. The effect of the paragraph was thus to deprive the state courts of jurisdiction that they would otherwise have had in all matters listed in s 75.

2.214 Second, s 39(2) exercises the power in s 77(iii) of the Constitution to invest state courts with federal jurisdiction. Section 39(2) vests the several courts of the states with federal jurisdiction ‘in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it’. That phrase presumably refers to all the matters listed in sections 75 and 76 of the Constitution. The effect of the paragraph was thus to invest state courts with jurisdiction over the full range of matters enumerated in sections 75 and 76 (except those made exclusive to the High Court by s 38), but to do so subject to conditions. By this means, a portion of the state jurisdiction of state courts was transformed into federal jurisdiction, and thus made subject to the conditions listed in s 39 (see paragraphs 2.219–2.248).

2.215 As Dixon J explained in *Minister for Army v Parbury Henty and Co*,

[t]he provision [s 39] was meant to cover the whole field of federal jurisdiction so that the conditions embodied in the four paragraphs of sub sec 2 should govern its exercise...An acknowledged purpose was to exclude appeals as of right to the Privy Council, and it was intended to exclude them over the whole field of federal jurisdiction.<sup>225</sup>

2.216 The scheme of s 39 produced a degree of confusion and a great deal of litigation for nearly 70 years. The source of the confusion was that what was taken away from the states by s 39(1) and what was given to them as federal jurisdiction under s 39(2) were not co-extensive. Leaving aside the matters made exclusive to the High Court under s 38, s 39(1) appeared to deprive the states of jurisdiction only in s 75 matters, whereas s 39(2) appeared to invest those courts with federal jurisdiction on both sections 75 and 76 matters. The result was that in s 76 matters, state courts arguably possessed two separate sources of jurisdiction. The first source was federal jurisdiction, which was subject to the conditions listed in s 39(2). The second source was state jurisdiction, which belonged to them as courts of general jurisdiction prior to the *Judiciary Act* and which was not subject to conditions. The long history of argument about the validity, meaning and scope of s 39 is recounted by Cowen and Zines.<sup>226</sup>

225 (1945) 70 CLR 459, 505.

226 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 200–14.

2.217 In *Lorenzo v Carey*,<sup>227</sup> for example, the High Court held that a state court could possess both state and federal jurisdiction in relation to matters arising under any laws made by federal Parliament (s 76(ii) of the Constitution). The existence of state courts having two sources of jurisdiction could give rise to difficulties in relation to the availability of appeals to the Privy Council. If state jurisdiction were being exercised in a case in which federal jurisdiction also existed, then the conditions in s 39(2) as to appeals would not apply — a result that the High Court was ‘anxious to avoid’.<sup>228</sup>

2.218 The High Court belatedly put an end to this confusion in 1971 with its decision in *Felton v Mulligan*.<sup>229</sup> It was held in this case, contrary to *Lorenzo v Carey*, that federal jurisdiction excluded the operation of concurrent state jurisdiction due to s 109 of the Constitution, which renders a state law inoperative to the extent that it is inconsistent with a Commonwealth law. As Barwick CJ noted

if federal jurisdiction is attracted at any stage of the proceedings, there is no room for the exercise of a state jurisdiction which apart from any operation of the Judiciary Act the state court would have had. In my opinion, s.109 of the Constitution, working with the Judiciary Act, ensures that there is no state jurisdiction capable of concurrent exercise with the federal jurisdiction invested in the state court.<sup>230</sup>

**Question 2.29.** In light of established case law, is there any value in clarifying the operation of s 39 of the *Judiciary Act*, in so far as it removes and then re-confers federal jurisdiction on state courts? In particular, should legislation make it clear that both s 39(1) and s 39(2) operate co-extensively on s 75 and s 76 matters, thereby avoiding the difficulty considered in *Felton v Mulligan*?

### Conditions imposed by the *Judiciary Act*

2.219 Section 39(2) JA imposes the following ‘conditions and restrictions’ on the exercise of federal jurisdiction by state courts

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227 (1921) 29 CLR 243.

228 H Renfree *The federal judicial system of Australia* Legal Books Sydney 1984, 546.

229 (1971) 124 CLR 367.

230 *id.*, 373. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 561 (McHugh J).

- (a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.  
Special leave to appeal from decisions of State Courts though state law prohibits appeal
- (c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

Exercise of federal jurisdiction by State Courts of summary jurisdiction

- (d) The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred.

2.220 Until 1976 there was an additional condition listed in s 39. Section 39(2)(b) provided that wherever an appeal lay from a decision of any state court or judge to the Supreme Court of the state, an appeal from the decision could be brought to the High Court. Paragraph (b) was deleted by s 8 of the *Judiciary Amendment Act 1976* (Cth). No reason was given for the repeal of the paragraph in the relevant parliamentary debates. Presumably it was considered that s 39(2)(b) was unnecessary in the light of s 73 of the Constitution and s 35 JA (see Chapter 4).

2.221 The following paragraphs review the conditions currently imposed by s 39. With some exceptions, they appear to have produced little controversy or litigation.

#### ***Privy Council appeals — s 39(2)(a)***

2.222 The first condition specified by s 39(2) JA prevents appeals being taken from a state court to the Privy Council when exercising federal jurisdiction. It has been said that this was one of the principal purposes of s 39,<sup>231</sup> and that the section sought to ensure, as far as possible, that constitutional cases should find their ultimate solution in the High Court of Australia.<sup>232</sup> Indeed, s 39(2)(b) may be seen as one of a range of measures designed to restrict, and eventually to eliminate, appeals from all Australian Courts to the Privy Council.

231 *Knight v Knight* (1971) 124 CLR 367, 393 (Windeyer J).

232 H Renfree *The federal judicial system of Australia* Legal Books Sydney 1984, 541.

2.223 There was considerable dissatisfaction with appeals to the Privy Council, extending as far back as appeals from the courts of the Australian colonies.<sup>233</sup> The arrangement was seen as distant and expensive, with the potential for the Privy Council to fail to appreciate or misinterpret local laws. The draft Constitution submitted to the Imperial Government substantially excluded appeals to the Privy Council. However, the Imperial Government considered that exclusion to be unacceptable on the basis of its concern that the High Court would then become the final arbiter on matters affecting Imperial interests.

2.224 The provisions of sections 73 and 74 of the Constitution represented a compromise. In particular, s 74 provided that no appeal could be taken from the High Court to the Privy Council on any 'inter se' question affecting the constitutional limits of the Commonwealth and the states or of two or more states, unless the High Court certified that such an appeal should be granted.

2.225 After federation, there was an evolutionary process by which appeals to the Privy Council were gradually reduced. There were significant differences, however, between the channels of appeal available to the Privy Council from the High Court, on the one hand and from the state Supreme Courts on the other.

2.226 In relation to appeals from the High Court to the Privy Council the most significant developments were as follows:

- ?? The limitation in s 74 of the Constitution itself, prohibiting appeals on 'inter se' questions, unless the High Court granted a certificate.
- ?? The *Privy Council (Limitation of Appeals) Act 1968* (Cth), which effectively prevented appeals from the High Court to the Privy Council in matters of federal jurisdiction. This Act nevertheless preserved an avenue of appeal from the High Court to the Privy Council in matters of state law that had come to the High Court on appeal from a state Supreme Court.
- ?? The *Privy Council (Appeals from the High Court) Act 1975* (Cth), which eliminated appeals to the Privy Council from the High Court in matters of state law.

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<sup>233</sup> A Mason 'The evolving role and function of the High Court of Australia' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 95–102; J Bennett *Keystone of the federal arch. A historical memoir of the High Court of Australia to 1980* AGPS Canberra 1980, 95.

- ?? The High Court's acknowledgement in 1985 that, despite the theoretical possibility of it granting a certificate on an inter se matter pursuant to s 74, it was unlikely ever to invoke this 'obsolete' or 'dead letter' jurisdiction.<sup>234</sup> It is noteworthy that in only one case has the High Court ever granted a certificate under s 74<sup>235</sup> — since then every application has been refused.

2.227 Appeals from state Supreme Courts to the Privy Council were less susceptible to federal regulation, politically if not legally, because of the historical foundations of that avenue of appeal, which pre-dated federation. Nonetheless, inroads were gradually made here as well, the most significant developments being as follows:

- ?? The condition imposed in 1903 by s 39(2)(a) JA on the exercise of federal jurisdiction by state courts, which had the effect of making the exercise of federal jurisdiction by a state Supreme Court final except for an appeal to the High Court.<sup>236</sup>
- ?? The introduction in 1907 of s 40A JA, which provided for the automatic removal to the High Court of a cause pending in a state Supreme Court involving an inter se question.<sup>237</sup>
- ?? The passage of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (Imp). The Acts abolished the remaining channel of appeal to the Privy Council from state Supreme Courts in matters of state law. This eliminated the problem, which had existed since 1975, that in matters of state law there were two final courts of appeal — the High Court and the Privy Council.

2.228 It is apparent that, historically speaking, s 39(2)(a) JA was a significant tool for achieving the goal that the founders of the Constitution had sought to achieve in the Constitution itself, namely, making the High Court the final court of appeal in all matters of Australian law. With the theoretical exception of a certificate issued under s 74 of the Constitution, that goal has now been achieved. Section 11(1) of the *Australia Act 1986* (Cth) provides:

234 *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461, 465; *Western Australia v Hammersley Iron Pty Ltd (No 2)* (1969) 120 CLR 74, 84 (Kitto J).

235 *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth (The Royal Commissions Case)* (1912) 15 CLR 183.

236 In *Webb v Outtrim* (1906) 4 CLR 35 the Privy Council decided that the section did not prevent an appeal from a state court to the Privy Council in the exercise of invested federal jurisdiction. However, the High Court subsequently refused to follow this decision on the basis that it need not do so as the case had involved an inter se question reserved by s 74 for the High Court: *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1137–40.

237 The section was repealed by the *Judiciary Amendment Act 1976* (Cth).

Subject to subsection (4) below, no appeal to Her Majesty in Council lies or shall be brought, whether by leave or special leave of any court or of Her Majesty in Council or otherwise, and whether by virtue of any Act of the Parliament of the United Kingdom, the Royal Prerogative or otherwise, from or in respect of any decision of an Australian court.

2.229 In view of this provision, it is doubtful whether s 39(2)(a) JA has any contemporary relevance.

***State restraints on appeals — s 39(2)(c)***

2.230 The apparent purpose of s 39(2)(c) is to nullify the effect of state laws that seek to limit the right of appeal to the High Court from the courts of that state. Thus, in the same way as paragraph (a) sought to prevent the High Court's appellate role being evaded by appeals to the Privy Council, paragraph (c) sought to ensure that the states did not evade that role by interfering with rights of appeal. Accordingly, the paragraph recognises the right of the High Court to grant leave to appeal notwithstanding any state law prohibiting an appeal.

2.231 Paragraph (c) may arguably be unnecessary in the light of the High Court's appellate jurisdiction conferred by s 73 of the Constitution and s 35 JA. Section 73 of the Constitution implicitly guarantees certain channels of appeal from state courts to the High Court (subject to legislative exceptions and regulations) and would thus invalidate any inconsistent state prohibition on appeals. Moreover, it might also be argued that s 35 JA, which deals generally with appeals to the High Court from judgments of the Supreme Court of a state, whether or not in the exercise of federal jurisdiction, overrides any inconsistent state laws pursuant to s 109 of the Constitution.

2.232 It should also be noted that the now repealed paragraph (b) appeared to perform a similar function to paragraph (c) in that the former provided that wherever an appeal lay from a decision of any state court or judge to the Supreme Court of the state, an appeal could be brought to the High Court.

2.233 It is arguable that the purpose that was sought to be achieved by s 39(2)(c) could be achieved more transparently in federal legislation. For example, s 35 JA might be amended to provide that the High Court may hear appeals from judgments of any state court exercising federal jurisdiction, notwithstanding any state law to the contrary.

***Qualifications in courts of summary jurisdiction — s 39(2)(d)***

2.234 Section 39(2)(d) states that when a state court exercises federal jurisdiction summarily, the jurisdiction must be exercised by a person falling within one of three classes. These are (i) a stipendiary, police or special magistrate; (ii) a state magistrate specially authorised by the Governor-General to exercise such jurisdiction; or (iii) an arbitrator on whom jurisdiction is conferred by state law.

2.235 Courts of summary jurisdiction refer to courts that are generally presided over by magistrates, being courts of the lowest tier in the court hierarchy, exercising limited criminal and civil jurisdiction. Until the establishment of the Federal Magistrates Court in 1999, only the states and territories had courts of summary jurisdiction.

2.236 The precise purpose of the condition is not easy to discern but probably relates to a federal concern with the qualifications or quality of persons exercising the judicial power of the Commonwealth. For example, several colonial courts in Australia developed the practice quite early on of using stipendiary magistrates to exercise summary jurisdiction. This practice differed from that in England, where lay magistrates were (and still are) the norm. The essential difference rested in the qualifications and experience of the magistrates. Stipendiary magistrates were generally legally qualified, full-time adjudicators; lay magistrates were not. In Australia, there was an apparent concern that some magistrates — for example lay magistrates — might not be suitable to exercise federal jurisdiction by reason of their lack of formal legal qualifications, experience or expertise.

2.237 One concern that has been raised in relation to s 39(2)(d) is whether it infringes an implied constitutional limitation on the investiture of state courts with federal jurisdiction. It was earlier mentioned that the Commonwealth Parliament cannot interfere with the structure or organisation of state courts when investing them with federal jurisdiction — it must take the state courts as it finds them (see paragraphs 2.190–2.197). It might be thought that s 39(2)(d) breaches this rule by dictating the type of state court personnel who may exercise federal jurisdiction.

2.238 In an early case, *Troy v Wrigglesworth*,<sup>238</sup> the High Court assumed the validity of s 39(2)(d). The Court held that where a state court exercises federal jurisdiction the requirements of s 39(2)(d) applied. Consequently, such a matter could not validly be heard by a lay magistrate, but must be reheard by a police magistrate or such other magistrate as is referred to in s 39(2)(d).

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238 (1919) 26 CLR 305.

2.239 Despite the concerns about its validity, in *Queen Victoria Memorial Hospital v Thornton*<sup>239</sup> the High Court unanimously found s 39(2)(d) to be a valid exercise of legislative power. However, the Court declined to be drawn on whether the power to enact s 39(2)(d) arose from s 51(xxxix) or s 79 of the Constitution.<sup>240</sup> It was subsequently suggested by Brennan J in *Brown v The Queen* that the paragraph is valid as it deals only with procedure, requiring a state court to exercise the invested jurisdiction by adopting one of the modes of trial that state law prescribes for the exercise of the court's analogous jurisdiction.<sup>241</sup> On the basis of that conclusion, Brennan J held that the Commonwealth Parliament is empowered to require a state court, which ordinarily sits with a jury in criminal trials, to be constituted and organised in accordance with s 80 of the Constitution so that it sits with a jury whenever it exercises analogous jurisdiction under federal criminal law.

2.240 Assuming s 39(2)(d) to be valid, the question remains as to whether the condition is appropriate today. One issue is whether the categories of persons identified in the paragraph (for example 'stipendiary, police or special magistrate') are relevant to current state law and practice across Australia. Another is whether the section as currently framed achieves its supposed goal of ensuring that federal jurisdiction is exercised only by suitably qualified persons.

2.241 The evolution of the role of magistrates — from their beginnings as honorary justices of the peace carrying out administrative, law enforcement and judicial functions in the colonies, to their modern judicial function — was not complete at the time of enactment of the *Judiciary Act*. Consequently, many of the distinctions drawn in s 39(2)(d), though relevant in 1903, are arguably no longer meaningful.

2.242 It has been stated that 'the distinctive feature of the Australian magistracy is the early and relatively widespread use of paid magistrates'.<sup>242</sup> Police magistrates were introduced in all Australian colonies in the early 19<sup>th</sup> century to carry out peace-keeping, detective, arrest, sentencing and punishing functions, and they were essentially the forerunners of stipendiary magistrates.<sup>243</sup> In 1881 the position of stipendiary magistrate was created as a designated office in New South Wales.<sup>244</sup> Since that time there has been a significant change in the nature and function of

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239 (1953) 87 CLR 144.

240 *id.*, 152.

241 (1986) 160 CLR 171, 200 (Brennan J).

242 J Lowndes *The Australian magistracy: From justices of the peace to judges and beyond* (2000) 74 *Australian Law Journal* 509, 514, citing H Golder *High and responsible office: A history of the NSW magistracy* Oxford University Press Sydney 1991.

243 The first was D'Arcy Wentworth in NSW in 1810. J Lowndes *The Australian magistracy: From justices of the peace to judges and beyond* (2000) 74 *Australian Law Journal* 509, 523.

244 *Stipendiary Magistrates Act 1881* (NSW).



magistrates in Australia — the role of magistrates became more judicial than administrative; lay magistrates were prohibited from sitting in certain courts of summary jurisdiction; honorary appointment became correspondingly rare; and the magistracy began to acquire a degree of ‘judicial independence’.<sup>245</sup>

2.243 The *Public Service Act 1895* (NSW) saw the magistracy become part of the public service in New South Wales, and this was followed in the other states and territories. In the early 1900s, the magistracy suffered the consequential detriments associated with lateral appointment and ‘insider preference’, but criticism of such practices led to the development of a practice of preferring appointees with legal qualifications. In all states, the magistracy is no longer part of the public service and is structurally independent, under the administration of a Chief Magistrate who reports directly to Cabinet.<sup>246</sup> Magistrates are appointed by the Executive, or by the Governor on advice of the Executive, having been recommended by the Attorney-General.

2.244 Statutes governing the magistracy now require magistrates not only to be legally qualified, but also to be admitted to practice as a barrister or solicitor in the Supreme Court of the relevant state, in most cases with at least five years experience.<sup>247</sup> Section 39(2)(d) JA appears in its language to anticipate the possibility that a magistrate might be inadequately qualified or experienced for the summary exercise of federal jurisdiction. However, the general similarity in the qualifications required for appointment to the magistracy in the states and territories raises questions about the function of s 39(2)(d).

2.245 The categories of magistrate used in s 39(2)(d) also appear to be anachronistic. The term ‘stipendiary’ has been dropped in many states.<sup>248</sup> As nearly all magistrates are now salaried and appointed pursuant to statute, there is little reason to distinguish between magistrates on the basis of their title as a stipendiary magistrate. The use of the term ‘special magistrate’ also appears outdated. This was the generic name used for both paid and unpaid magistrates in the Northern Territory,<sup>249</sup> when that area was under control of South Australia (1863–1911), but the term is no longer in use. In New South Wales, the ‘very anachronistic

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245 J Lowndes *The Australian magistracy: From justices of the peace to judges and beyond* (2000) 74 *Australian Law Journal* 509, 515.

246 *Local Courts Act 1982* (NSW); earlier in other states and territories. See J Lowndes *The Australian magistracy: From justices of the peace to judges and beyond* (2000) 74 *Australian Law Journal* 509.

247 id, 525–527.

248 Queensland, Western Australia and Northern Territory still use the term ‘stipendiary magistrate’ in their legislation: *Stipendiary Magistrates Act 1991* (Qld); *Stipendiary Magistrates Act 1957* (WA) *Magistrates Act 1991* (NT).

249 Pursuant to the *Local Courts Ordinance 1850* (SA).

designation of “police magistrate”<sup>250</sup> was abolished by the *Justices Amendment Act 1947* (NSW).

2.246 Another issue is whether it might be preferable to determine the suitability of magistrates to exercise federal jurisdiction by means other than formal title. For example, concerns have been expressed about the suitability of some state magistrates to exercise family law jurisdiction. This Commission and the Human Rights and Equal Opportunity Commission, in their joint report *Seen and heard: priority for children in the legal process*, canvassed concerns about generalist magistrates dealing with family law matters.<sup>251</sup> The Commissions recommended that the states and territories establish a specialist magistracy to exercise federal family law jurisdiction. The establishment of the Federal Magistrates Court will have an impact on the extent to which state and territory magistrates exercise family law jurisdiction.

2.247 One response to such concerns might be to prescribe minimum standards for appointment as a state magistrate exercising federal jurisdiction. These standards might be prescribed by legislation, or might have less formal status, such as guidelines. Subject to constitutional constraints imposed by the need to preserve the structure and constitution of state courts, these standards might extend to matters such as legal qualifications, terms of appointment, experience and training.

2.248 An indication of some of the factors that might be considered in formulating such standards can be derived from the recently established Federal Magistrates Court. The *Federal Magistrates Act 1999* (Cth) has a schedule concerning personnel provisions relating to federal magistrates.<sup>252</sup> It provides, for example, that a person must not be appointed a federal magistrate unless he or she has been enrolled as a legal practitioner of the High Court or a Supreme Court of a state or territory for at least five years. Such a person cannot be appointed if 70 years old and the appointment is to be for a term expiring on reaching 70. Federal magistrates can be appointed on a full-time or part-time basis and are limited in the paid outside work they may perform. Importantly in terms of establishing specialisation, under s 12(3) of the Act, the Chief Federal Magistrate may, subject to consultation, make arrangements as to which federal magistrate is to constitute the Federal Magistrates Court in particular matters or classes of matters.

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250 J Lowndes *The Australian magistracy: From justices of the peace to judges and beyond* (2000) 74 *Australian Law Journal* 509, 517.

251 ALRC 84, para 15.61–15.74, rec 130.

252 Sch 1.

**Question 2.30.** In view of the abolition of appeals from all Australia courts to the Privy Council by the *Australia Act 1986* (Cth) and the *Australia Act 1986* (Imp), is there any need to retain the condition specified in s 39(2)(a) of the *Judiciary Act*?

**Question 2.31.** Is the condition in s 39(2)(c), which prohibits state laws that restrict appeals to the High Court, necessary in the light of s 73 of the Constitution and s 35 of the *Judiciary Act*? Might other provisions achieve the same result with greater transparency?

**Question 2.32.** What is the rationale of the condition specified in s 39(2)(d)? Within the limits set by the Constitution, should the paragraph be amended to clarify what class of persons should be excluded from exercising federal jurisdiction, or to specify the minimum qualifications for appointment as a state magistrate in the exercise of federal jurisdiction?

**Question 2.33.** What conditions, if any, should now be imposed on the exercise of federal jurisdiction by state courts and how does this relate to the newly emerging jurisprudence of the High Court in cases such as *Kable v Director of Public Prosecutions (NSW)*?<sup>253</sup>

## Federal jurisdiction conferred by other Acts

### *The ambulatory nature of s 39*

2.249 Section 39(2) JA is said to be ‘ambulatory’ in nature, that is, ‘it continues in force from day to day as a law presently speaking’.<sup>254</sup> As a result, s 39(2) continues to update federal jurisdiction in line with the relevant developments in state law. Thus, when state legislation increases the jurisdictional monetary limit for a particular state court, that new amount applies when that court exercises federal jurisdiction<sup>255</sup> and if a new state court is created it is automatically invested with federal jurisdiction.<sup>256</sup> It has been suggested that the ambulatory nature of s 39 has given the section almost the same force as a constitutional provision.<sup>257</sup>

253 (1997) 189 CLR 51.

254 *Commonwealth v District Court* (1954) 90 CLR 13, 22, 20; see also *Le Mesurier v Connor* (1929) 42 CLR 481, 503; P Lane *Lane’s Commentary on the Australian Constitution* 2<sup>nd</sup> ed LBC Information Services North Ryde 1997, 632–33.

255 *Commonwealth v District Court* (1954) 90 CLR 13, 20.

256 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 536.

257 H Renfree *The federal judicial system of Australia* Legal Books Sydney 1984, 572.

2.250 Doubts have been expressed as to what is necessary to exclude the operation of s 39. In *Adams v Cleeve*, Rich, Dixon and Evatt JJ said

[s]ection 39 is expressed in terms of perfectly general application, and such an application accords with the principles upon which the enactment proceeds. To exclude its operation upon any part of federal jurisdiction more is required than a special provision conferring part of the jurisdiction, either original or appellate, which s 39 also confers. If the special provision conferred a different authority, or imposed conditions or restrictions or otherwise disclosed an intention at variance with the full operation of s 39, an intention to exclude it might be inferred.<sup>258</sup>

2.251 In *R v Ward* the High Court attempted to clarify the above passage in the following terms.

We do not think that by the last sentence their Honours were saying that wherever the special provision confers a jurisdiction different from that conferred by s 39 of the *Judiciary Act*, s 39 is thereby totally excluded.

No doubt their Honours had in contemplation a contradictory or inconsistent authority from which it might be deduced that the Parliament was displacing *pro tanto* the grant of jurisdiction contained in s 39.<sup>259</sup>

2.252 A major element in this question of how s 39 might be excluded was whether the ‘conditions and restrictions’ in s 39(2) applied where federal jurisdiction was conferred on a state court otherwise than by s 39(2).<sup>260</sup> The High Court in *Seaegg v The King*<sup>261</sup> left the question open and in *Frost v Stephenson*, Dixon J suggested that it was unresolved whether s 39(2) would ‘govern an authority which is given by a Federal statute to state courts for the first time and does not otherwise exist’.<sup>262</sup>

2.253 This issue was dealt with again by the High Court in *Goward v Commonwealth*.<sup>263</sup> The case concerned s 20 of the *Commonwealth Employees' Compensation Act 1930* (Cth), which allowed an appeal to a county court in relation to a determination under that Act. A ‘county court’ was defined under the Act to mean a county court, district court, local court, or any court exercising a limited civil jurisdiction and presided over by a judge or a police, stipendiary or special magistrate, of a state or territory of the Commonwealth. An order pursuant to s 20 was made by a stipendiary magistrate constituting a Queensland court of

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258 (1935) 53 CLR 185, 190–191.

259 (1978) 52 ALJR 542, 544.

260 H Renfree *The federal judicial system of Australia* Legal Books Sydney 1984, 575.

261 (1932) 48 CLR 251.

262 (1937) 58 CLR 528, 570–571.

263 (1957) 97 CLR 355.

petty sessions. Special leave to appeal to the High Court was applied for in relation to the magistrate's decision on the basis that s 39(2) applied to the proceeding.

2.254 The Court conceded that it could be argued that s 39(2) did not apply to s 20, as the latter was new federal jurisdiction conferred by subsequent Commonwealth legislation.<sup>264</sup> However, the Court held that having regard to the 'basal character' of s 39 and its purposes, s 20 should be treated as implying that the general nature of the federal jurisdiction of state courts is fixed by s 39's provisions.<sup>265</sup> Thus, it was held that the restrictions in paragraphs (b), (c) and (d) of s 39(2) applied in relation to s 20 of the *Commonwealth Employees' Compensation Act 1930* (Cth). However, the decision did not clarify how subsequent legislation affects the operation of s 39(2) as a general matter.

### *The effect of s 39A*

2.255 The issue of the scope of s 39(2) was clarified in 1968 by the inclusion of s 39A JA. This section regulates cases where federal jurisdiction is invested in a state court, 'whether the investing occurred or occurs before or after the commencement of this section, including federal jurisdiction invested by a provision of this Act other than the last preceding section [ie s 39]'. The section purports to indicate how the conditions in s 39(2) apply in the light of subsequent legislation, and it articulates a three-level approach.

2.256 First, s 39A(1)(a) provides that the investiture of federal jurisdiction shall be subject to s 39(2)(a), which is the condition prohibiting appeals to the Privy Council from state courts exercising federal jurisdiction. The implication is that this condition is intended to apply in all cases. Second, s 39A(1)(b) provides that the investiture of federal jurisdiction shall also be subject to s 39(2)(c) and (d), but only 'so far as they are capable of application and are not inconsistent with' a specific provision of the investing Act. This provision thus recognises that the conditions in s 39(2)(c) and (d) are generally applicable but will give way to contrary provisions in later federal legislation. Finally, s 39A(1)(c) recognises that 'any other conditions or restrictions subject to which the jurisdiction is expressed to be invested' shall take effect. In other words, later legislation can impose additional conditions on the exercise of federal jurisdiction, apart from those specified in s 39(2)(a), (c) and (d).

2.257 Section 39A is problematic in several respects. The proviso in s 39A(1)(b) that s 39(2)(c) and (d) apply only so far as they are capable of application and not inconsistent with the Act conferring jurisdiction might substantially impair the goal

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<sup>264</sup> id, 360.

<sup>265</sup> *ibid.*

of ensuring that the conditions in s 39(2) apply to state courts invested with federal jurisdiction. The consequence is that the conditions on which state courts exercise federal jurisdiction may vary from sector to sector, in accordance with the subject matter of later federal Acts. There is a danger that over time a piecemeal approach might develop and that the goals of s 39 will be undermined.

2.258 More fundamentally, s 39A(1)(a) is problematic in so far as it purports to limit the capacity of the Commonwealth Parliament to alter the conditions set out in s 39(2)(a) by later or specific legislation. The federal legislature might have indicated its intention in 1968 to subject all specific Acts investing federal jurisdiction in state courts to the condition in s 39(2)(a). However, in accordance with fundamental principles of statutory interpretation, such an expression of intention would not prevent a later Act from departing from that condition by clear and unequivocal language. As Griffith CJ stated in *Goodwin v Phillips*

[w]here the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication.<sup>266</sup>

2.259 Questions might also be raised about s 39A(1)(b). Arguably, the language of s 39A(1)(b) does little more than reiterate two accepted canons of statutory interpretation, namely, that a later Act impliedly repeals an earlier Act with which it is inconsistent, and a general Act (in this case s 39) will usually give way to a special Act with which it is inconsistent. To quote again from *Goodwin v Phillips*:<sup>267</sup>

Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.

2.260 It might be that the relationship between s 39 and later Acts could be clarified by stating that s 39 is to apply except where otherwise *expressly* provided. However, such attempts to limit later legislation have generally been insufficient to protect the earlier Act from implied repeal by inconsistent later legislation.<sup>268</sup>

#### ***Other legislative examples***

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266 (1908) 7 CLR 1, 7 (Griffith CJ). See generally, D Pearce *Statutory interpretation in Australia* 4<sup>th</sup> ed 1996, 198–205.

267 (1908) 7 CLR 1, 14 (O'Connor J).

268 *Rose v Hyric* (1963) 108 CLR 353; *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603.

2.261 There are many examples of federal Acts specifically conferring federal jurisdiction on state courts, particularly state Supreme Courts. Such conferral may be in relation to civil or criminal jurisdiction. The following paragraphs discuss some significant examples of legislative conferral.

2.262 Within the *Judiciary Act* itself, s 17 confers federal jurisdiction on state courts in certain matters pending in the High Court. Section 17 invests the Supreme Court of a state with federal jurisdiction to hear and determine any applications that may be made to a judge of the High Court sitting in chambers, other than those in which the High Court's jurisdiction is exclusive. The jurisdiction may be exercised by a single judge of the Supreme Court sitting in chambers and any order shall have effect as an order of a judge of the High Court sitting in chambers.

2.263 Section 32A FCAA makes very similar provision in relation to matters pending in the Federal Court of Australia. The section states that the Supreme Court of a state is invested with federal jurisdiction (and to the extent the Constitution permits, jurisdiction is conferred on the Supreme Court of the Northern Territory) to hear and determine any application that may be made to a judge of the Federal Court sitting in chambers. Jurisdiction under this section may be exercised by a single judge of the Supreme Court sitting in chambers and the order shall have effect as an order of a judge of the Federal Court sitting in chambers. Any appeal against the order, or proceedings for enforcement of the order or for contempt in relation to the order, shall be brought and dealt with as if the order were an order of a judge of the Federal Court.

2.264 Other legislation conferring federal jurisdiction on state courts includes the following selective examples from the field of intellectual property law.

?? Under s 192 of the *Trade Marks Act 1955* (Cth) prescribed courts,<sup>269</sup> including state Supreme Courts and the ACT and Northern Territory Supreme Courts, have jurisdiction with respect to matters in which an action or proceeding may be started in a prescribed court under the Act. Certain sections refer to matters in which prescribed courts may make orders.<sup>270</sup>

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269 *Trade Marks Act 1955* (Cth) s 6, 190.

270 *id.*, s 85–88.

- ?? Section 40G(1B) of the *Designs Act 1906* (Cth) confers jurisdiction on prescribed courts with respect to matters arising under the Act for which actions or proceedings may, under a provision of the Act, be instituted in a prescribed court. A prescribed court is defined as the Federal Court, a state Supreme Court or the Supreme Court of the ACT, the Northern Territory or Norfolk Island.<sup>271</sup> Certain sections refer to matters in which applications may be made to a prescribed court.
- ?? Section 155 of the *Patents Act 1990* (Cth) confers jurisdiction on prescribed courts other than the Federal Court with respect to matters arising under the Act in respect of which proceedings may be started in a prescribed court under the Act. A prescribed court is defined as the Federal Court, a state Supreme Court or the Supreme Court of the ACT, the Northern Territory or Norfolk Island.<sup>272</sup> Certain sections of the Act refer to applications that may be made to a prescribed court.<sup>273</sup>

#### ***Conditions imposed by other Acts***

2.265 At this stage of the inquiry the Commission has not sought to chart the circumstances in which federal Acts other than the *Judiciary Act* seek to impose conditions or restrictions on the exercise of federal jurisdiction by state courts. Nor has it sought to compare such conditions with those enumerated in s 39(2) JA.

2.266 One issue is whether it would be desirable to relocate to the *Judiciary Act* all provisions of federal law that invest state courts with federal jurisdiction or impose conditions on the exercise of that jurisdiction. To do so might increase the transparency of state involvement in the federal civil justice system. On the other hand, it might be argued that these provisions are better located in the legislation that sets out the substantive provisions and the context in which federal jurisdiction is being exercised. One possibility might be to use notes to the *Judiciary Act* to cross-refer to other relevant legislation, and vice versa.

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271 *Designs Act 1906* (Cth) s 4.

272 *Patents Act 1990* (Cth), sch 1.

273 *id.*, s 125, 126, 128.



**Question 2.34.** How effective is s 39A in so far as it seeks to impose the conditions listed in s 39(2) on any subsequent conferral of federal jurisdiction on state courts? In particular, is s 39A(1)(a) effective in subjecting later Acts to the condition in s 39(2)(a) regarding appeals to the Privy Council? Is s 39A(1)(a) necessary in view of the abolition of appeals to the Privy Council from Australian courts?

**Question 2.35.** Does the proviso in s 39A(1)(b) that the conditions in s 39(2)(c) and (d) apply to subsequent legislation only in so far as those conditions are capable of application and are not inconsistent with the Act conferring jurisdiction, substantially impair the goal of s 39(2)?

**Question 2.36.** Should the various federal laws that invest state courts with federal jurisdiction, or impose conditions on the exercise of that jurisdiction, be located in the *Judiciary Act*?

### 3. Transfer of proceedings between and within courts

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#### Introduction

3.1 Every mature judicial system requires mechanisms for ensuring that proceedings are heard in the most appropriate forum and venue, having regard to the interests of the parties and the ends of justice. This Chapter considers the transfer of proceedings between and within courts exercising federal jurisdiction and jurisdiction under Commonwealth laws.<sup>1</sup> The *Judiciary Act* plays a central role in these transfers.

3.2 Transfer is an important aspect of the allocation of federal jurisdiction because it ensures that proceedings are heard in the most appropriate court. Inadequate transfer procedures may result in delays and increased costs both to parties and the administration of justice through aborted or multiple proceedings and increased travel costs for parties, witnesses and legal representatives. Transfer procedures which are overly complex or structurally deficient may also increase the amount of litigation about the venue for litigation. It is instructive to note that the cross-vesting scheme, which is further discussed at paragraphs 3.238–3.253, specifically excludes appeals about decisions to transfer a proceeding from one court to another, thereby reducing litigation about where to litigate.

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<sup>1</sup> The expression ‘jurisdiction under Commonwealth laws’ includes those matters arising in the territories that are arguably not within federal jurisdiction. See Ch 7.

3.3 In Australia, there are several mechanisms by which a matter may be brought to trial in the most appropriate forum. These include

- ?? change of venue provisions applicable to each federal court
- ?? cases stated or questions referred within a court from a single judge to a Full Court
- ?? reference of matters from one court to another
- ?? remittal of matters from one court to another court lower in the judicial hierarchy
- ?? removal of matters from one court to another court higher in the judicial hierarchy
- ?? the common law doctrine of *forum non conveniens* (inappropriate forum)
- ?? a stay of proceeding under s 20 of the *Service and Execution of Process Act 1992* (Cth), and
- ?? a transfer of a proceeding under s 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

3.4 There are some strong similarities, but also important differences, among this constellation of processes. The first five mechanisms identified above are founded on provisions in the *Judiciary Act* and related legislation such as the *High Court of Australia Act*, the *Federal Court of Australia Act*, the *Family Law Act*, and the *Federal Magistrates Act*.

3.5 The last three mechanisms are discussed briefly at the end of the Chapter. The Commission's terms of reference expressly exclude the making of recommendations in relation to the cross-vesting scheme. Moreover, the law relating to service and execution of process was the subject of a report by the Commission in 1987.<sup>2</sup> Nevertheless, it is necessary to discuss these methods in the present context for the purpose of explaining the broader framework within which transfers may be made between and within courts exercising federal jurisdiction.

3.6 It should be noted that the appellate process, perhaps the most common mechanism for transferring proceedings from one court to another, is dealt with separately in Chapter 4. Appeals differ from other forms of transfer discussed in this Chapter in so far as they constitute a review of a decision once made rather than an alteration of adjudicator or forum prior to a decision being made.

3.7 Although the mechanisms identified in paragraph 3.3 share a common objective of ensuring that a proceeding is continued in the most appropriate court, in the most appropriate location or before the most appropriate bench, they differ in a number of important respects, namely, whether they

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2 Australian Law Reform Commission Report 40 *Service and Execution of Process* ALRC Sydney 1987 (ALRC 40), substantially adopted in the *Service and Execution of Process Act 1992* (Cth).

- ?? are based on common law or statute
- ?? have a unilateral operation (providing for a stay of proceedings commenced inappropriately) or a bilateral operation (providing for a transfer to the most appropriate court)
- ?? embody structured or unstructured discretions
- ?? are internal to the workings of a single court or have an external impact on other courts
- ?? are based on comity and reciprocity, or alternatively reflect the hierarchical relationship between courts (for example, the High Court's power of removal and remitter), and
- ?? relate to the exercise of original jurisdiction, appellate jurisdiction or both.

3.8 This diversity of source and approach leads to the question whether it would be desirable and practical to attempt to incorporate in federal legislation comprehensive principles for regulating the transfer of proceedings between and within federal courts or courts exercising federal jurisdiction.

3.9 If a single federal Act were to prescribe comprehensive principles for transferring matters, there is the potential to increase the coherence and consistency of the system, to improve the accessibility of those procedures and to provide greater structure to the discretions involved. The potential disadvantages of such an approach include the costs of developing and enacting new legislation, the costs for practitioners and other users in understanding and advising on the new legislation, and the potential for the legislation to be overly prescriptive or to generate new litigation regarding its interpretation. If such legislation were to be considered appropriate for federal courts, or for courts exercising federal jurisdiction, a further issue that might arise is whether uniform legislation could and should be developed for all Australian courts.

**Question 3.1.** To what extent should federal legislation lay down comprehensive principles, rules and procedures for regulating the transfer of proceedings between or within courts. If such principles are developed, should they be uniform for all federal courts or for all courts exercising federal jurisdiction?

**Question 3.2.** What principles should be used to determine which is the most appropriate court for the trial of an action?

**Question 3.3.** What impact should the position of the court in the judicial hierarchy (whether as transferor or transferee) play in determining transfer?

**Question 3.4.** What powers should the transferring court have to attach conditions to the transfer?

**Question 3.5.** In what circumstances, if any, should the transferee court be able to refuse transfer or to accept it subject to conditions?

### **Transfers within a court: change of venue**

3.10 Federal courts such as the High Court, the Federal Court and the Family Court conduct their judicial business through registries or offices located in capital cities, and sometimes other major cities, throughout Australia. It is expected that the Federal Magistrates Court will also have registries throughout Australia.<sup>3</sup> The normal course is that a matter proceeds to hearing in the place where the initiating process is filed. However, legislation confers on each of these courts the power to move proceedings commenced in one of its registries or offices to another of its registries or offices.

3.11 In this section, the transfer of a matter from one registry or office to another is referred to as a change of venue. An important feature of this mechanism is that it involves the transfer of a matter within a single court rather than between different courts.<sup>4</sup> In this connection it is useful to distinguish between the concept of ‘venue’ and the concept of ‘forum’.<sup>5</sup> The former is taken here to mean the particular location at which a given court exercises its jurisdiction (for example, a Sydney or Melbourne sitting of the Federal Court); the latter identifies the law district whose courts are able to exercise jurisdiction in a particular matter (for example, New South Wales or Victoria, irrespective of which particular court hears the matter).

3.12 Under current legislation, the power to change venue is conferred in wide terms and the courts themselves have had to develop criteria for the exercise of discretion. The Full Court of the Federal Court, for example, has stated that as there is no statutory basis for confining its discretion to change venue, the Court is involved in ‘the exercise of a wide and unfettered discretion’.<sup>6</sup> Only the power conferred on the Family Court provides some criteria for the exercise of the discretion.

<sup>3</sup> s 98 FMA.

<sup>4</sup> Compare, for example, the transfer of a matter between courts, discussed in para 3.106-3.225.

<sup>5</sup> C Wright *Law of federal courts* (4<sup>th</sup> ed) West Publishing Company St Paul Minnesota 1984, 238–9.

<sup>6</sup> *Andrew and Frewin Pty Ltd v Arrow Ltd* (unreported) Federal Court 6 June 1990, para 18.

3.13 The power to change the venue of an action commenced in a federal court may have a significant impact on the rights and obligations of the parties by reason of s 79 JA. Section 79 requires a federal court to apply the law of the state or territory in which it exercises jurisdiction, subject to stated exceptions. That section is discussed in detail in Chapter 6.

3.14 There is much more case law on change of venue in relation to the Federal Court than in relation to other federal courts. This reflects the fact that the Federal Court has a wide commercial jurisdiction involving corporate and government litigants who have multiple offices across the country and conduct their activities on a nation-wide or sometimes international scale. The potential for applications to change venue is thus much greater at the interlocutory and trial stage in the Federal Court. It is nevertheless instructive to examine the situation of all federal courts.

### High Court

3.15 Section 31 HCAA provides that, subject to s 80 of the Constitution, the High Court may at any stage of a proceeding direct that the proceeding or a part of the proceeding be held or continued at a place specified in the order, subject to such conditions as the Court imposes. Section 80 of the Constitution states that the trial on indictment of any Commonwealth offence shall be by jury and every such trial shall be held in the state where the offence was committed. If the offence was not committed within any state the trial is to be held where the Parliament prescribes.

### Family Court

3.16 There is no primary power in the *Family Law Act* to change the venue of a proceeding. Instead, O 27 r 1 FLR provides that a party who has filed a pleading or affidavit in proceedings in a court exercising jurisdiction under the Act may, by application filed in the filing registry, apply to have the proceedings heard in another registry of that court. 'Filing registry' is defined in O 1 r 1 to mean 'the registry of that court in which the proceedings were instituted or, if the proceedings have been transferred to another registry of another court, then that registry'.

3.17 Under O 27 r 3, in considering such an application the court shall have regard to the availability of a court to hear the proceedings, the convenience of the parties, the limiting of expense and the costs of the proceedings, and any other relevant matter. However, case law identifies many other factors as being relevant to the exercise of the discretion.<sup>7</sup>

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7 CCH Australia Ltd *Australian Family Law and Practice* Vol 2 para 52–685.

### **Federal Magistrates Court**

3.18 Section 52 FMA provides for a change of venue in terms similar to the High Court's power. Section 52(1) states that the Federal Magistrates Court may sit at any place in Australia. Section 52(2) then provides that the Federal Magistrates Court or a federal magistrate may, at any stage of a proceeding in that Court, order that the proceeding or a part of the proceeding be conducted or continued at a place specified in the order, subject to such conditions (if any) as the Federal Magistrates Court or federal magistrate imposes.

### **Federal Court**

3.19 The Federal Court's power to change venue is similar to the High Court's power, although the former is not subject to the same limitation arising from s 80 of the Constitution as applies to the latter. Section 48 FCAA allows the Court or a judge at any stage of a proceeding to direct that the proceeding or part of a proceeding be conducted or continued at a place specified in the order, subject to such conditions (if any) as the Court or judge imposes. Order 10 r 1(2)(f) FCR allows the Court to direct that a proceeding be transferred from one registry to another and O 36 r 6 gives the Court power to direct at what particular place the trial of proceedings is to take place. The Federal Court uses these powers to enable it to sit where it is most convenient for the parties and the Court. For example, the Court may hear part of a case in one place and the rest of it in another place, as frequently occurs in native title matters. The Court has power to order transfer of its own motion. However, in practice, one or both parties will usually apply for a change of venue.

### ***General principles***

3.20 The major authority on change of venue in the Federal Court is *National Mutual Holdings Pty Ltd v Sentry Corporation*.<sup>8</sup> In that case, the Full Court of the Federal Court held that in determining applications for a 'change of venue' in a national court, such as the Federal Court, numerous factors might be taken into account and weighed in each case. Relevant factors in a particular case might include: the residence of parties and witnesses; expense to the parties; the place where the cause of action arose; and the convenience of the court itself. The Full Court decided that 'the balance of convenience will generally be a relevant consideration, but not necessarily determinative of each case'.<sup>9</sup> The Full Court concluded that

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<sup>8</sup> (1988) 19 FCR 155.

<sup>9</sup> *id.*, 162.

ultimately the test is: where can the case be conducted or continued most suitably, bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the court.<sup>10</sup>

3.21 While the Full Court held that there was no onus of proof in the strict sense to be discharged by the parties seeking to conduct or continue the proceedings elsewhere, it nevertheless held that

the Court must, however, be satisfied, after considering all relevant matters, that there is sound reason to direct that proceedings be conducted or continued at some place other than at which they started.<sup>11</sup>

3.22 In cases after *Sentry*, the Federal Court has shown that it will consider a wide range of factors in determining venue and give them different weight depending upon the individual circumstances.<sup>12</sup> These include non-litigious costs, jurisdiction clauses, the availability of modern communications, and the case management system of the Federal Court.

3.23 In *SP Investments v Federal Commissioner of Taxation*, French J held that where the convenience of the parties was ‘fairly evenly balanced’, the fact that one venue would mean a substantial liability of stamp duty for one party — a factor extraneous to the litigation — tipped the balance because of its impact on access to justice.<sup>13</sup>

3.24 In *Barde AS v Oceanfast Ferries Pty Ltd*, Tamberlin J indicated that modern communications technology, such as video conferencing, could often deal with apparent problems in location. Tamberlin J added that a factor to consider, particularly in interlocutory proceedings, was that

[t]his Court is committed to the principle of case management by the judge who is to eventually hear the proceeding in question.<sup>14</sup>

3.25 In *Australian Competition & Consumer Commission v Internic Technology Pty Ltd*<sup>15</sup> Lindgren J commented that, while the fact that the Australian Competition & Consumer Commission is a national regulatory body is relevant in a change of venue application, this should not mean that

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10 *ibid.*

11 *ibid.*

12 For subsequent cases see *The Thai Silk Co Ltd v Aser Nominees Pty Ltd* [1999] ATPR ¶ 9141–146 (Hill J); *Australian Securities Commission v Lord* (1991) 6 ACSR 171; *Re Claremont Petroleum NL; Re Moage Ltd v Claremont Petroleum NL* (1991) 6 ACSR 205.

13 (1989) 89 ATC ¶ 4,693–4,695.

14 [1997] FCA 315 (2 May 1997), 5.

15 [1998] ATPR ¶ 41–646.



all considerations of cost, convenience and expertise sought to be relied upon by the ACCC should be deemed irrelevant merely because it is, and is known to be, a national regulatory body. The fact that its resources and personnel are not unlimited is as well known as the fact that it is such a body with offices in Melbourne and Sydney.<sup>16</sup>

### *Effect of jurisdiction clauses*

3.26 One particular concern in the Federal Court cases on change of venue is the weight to be given to contractual clauses that state the jurisdiction to be resorted to in the event of a dispute. In *Motor Traders Warranty Investments Pty Ltd v Fortron Automotive Treatments Pty Ltd*,<sup>17</sup> Beaumont J decided that jurisdiction clauses, even if exclusive, are not in themselves decisive of venue and are only one factor to be considered. According to Beaumont J, such clauses ‘will be given effect only in the absence of countervailing reasons’. Lindgren J in *Australian Cooperative Foods v National Foods Milk Ltd*<sup>18</sup> also regarded a consent to jurisdiction in ‘Victorian Courts’ as inconclusive, being only one consideration in an application for change of venue.

3.27 A significant factor to consider is the type of jurisdiction clause in issue. There is a difference between those that identify a particular court (for example, ‘all proceedings shall be heard in the Federal Court of Australia’) and those that identify a particular place (for example, ‘all proceedings shall be heard in Victoria’, which might involve either a state or federal court). The former would not give rise to any presumption regarding venue in Australia (as that term is used here), while the latter might. The question in the latter case is how much weight should be given to such a clause. This will vary according to all the circumstances, including relevant statutory provisions. Thus, for example, in *Akai Pty Ltd v People’s Insurance Co Ltd*<sup>19</sup> the High Court considered the effect of an exclusive jurisdiction clause on an application for a stay of proceedings commenced in the New South Wales Supreme Court. The exclusive jurisdiction clause provided that any dispute arising from a credit insurance policy should be referred to ‘the Courts of England’. However, a majority of the High Court held that the strong bias in favour of giving effect to that exclusive clause was overridden by the public policy stated in the *Insurance Contracts Act 1984* (Cth), which would apply if the matter were tried in New South Wales.<sup>20</sup>

3.28 The discussion of the effect of jurisdiction clauses on change of venue must be placed in the context of the common law rules regarding jurisdiction clauses. In essence, the common law recognises a presumption that the parties should be kept

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<sup>16</sup> id, 41,157.

<sup>17</sup> [1997] FCA 1496 (19 November 1997), 3–4.

<sup>18</sup> [1998] FCA 376 (2 April 1998), 8.

<sup>19</sup> (1996) 188 CLR 418.

<sup>20</sup> id, 445.

to their bargain and so be required to litigate in their chosen forum, but this presumption may be rebutted in appropriate cases.<sup>21</sup> Where a plaintiff commences an action in breach of an agreement to refer disputes to a foreign court, and the defendant applies for a stay, the discretion will usually be exercised by granting the stay unless strong cause for not doing so is shown. The court in exercising its discretion will take into account all the circumstances of the case including: where the relevant evidence is located; the relative convenience and expense for the parties of the different locations; whether the law of the foreign court applies; with what countries the parties are connected; whether a party is merely seeking a procedural advantage; and whether the plaintiffs would be prejudiced by having to sue in the foreign court.<sup>22</sup> The court will not generally stay proceedings where a jurisdiction clause simply constitutes a submission to the designated court but does not purport to limit suits elsewhere.<sup>23</sup>

3.29 This common law presumption is likely to be influential in exercising the statutory discretion to change venue because the discretion is not structured by legislation. The breadth of the discretion would thus seem to accommodate the policy behind the common law rule.

3.30 In *KC Park Safe (SA) Pty Ltd v Adelaide Terrace Investments Pty Ltd*,<sup>24</sup> Finkelstein J, perhaps in keeping with the common law presumption, appeared to give greater weight than Beaumont J in the *Motor Traders* case or Lindgren J in the *Australian Cooperatives* case to the presence of a jurisdiction clause. In *KC Park Safe*, the parties had agreed that if a matter was to be litigated in a federal court, it must be litigated in the Adelaide Registry of that court. Finkelstein J said

In my view when parties have reached an agreement that a particular court or a court that sits at a particular place is to have exclusive jurisdiction to resolve their disputes, that agreement should be given effect unless there is some good reason why the parties should not be kept to their bargain.<sup>25</sup>

21 For a discussion of foreign jurisdiction clauses in the context of the inappropriate forum doctrine see P Nygh *Conflict of Laws* 6th ed Butterworths Sydney 1995, 100–119.

22 *The Eleftheria* [1970] P 24; *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992; *GWJ Blackman & Co SA v Oliver Davey Glass Co Pty Ltd* [1966] VR 570; *Leigh-Mardon Pty Ltd v PRC Inc* (1993) 44 FCR 88.

23 See Law Book Company Limited *The laws of Australia* Vol 5 Civil Procedure 5.11, para 24. Also see *Contractors Ltd v MTE Control Gear Ltd* [1964] SASR 47; *Aldred v Australian Building Industries Pty Ltd* (1987) 48 NTR 59; *Green v Australian Industrial Investment Ltd* (1989) 90 ALR 500, 512.

24 [1998] FCA 601 (15 May 1998).

25 *id.*, 6.

It does not appear that the manner in which a choice of jurisdiction clause should be given effect has been authoritatively resolved in this country. For my own part I see nothing in the decisions of the High Court<sup>26</sup> to which I have referred that prevents me from acting upon the wider principle stated by Mackinnon J in *Racecourse Betting Control Board*,<sup>27</sup> namely that a court can and should require parties to abide by their choice of a forum unless there is some good reason why that should not be done.<sup>28</sup>

## **Assessing change of venue powers**

### ***Who initiates a change of venue?***

3.31 One issue for consideration is whether legislation should provide that the court may order a change of venue of its own motion. The change of venue powers for the High Court, Federal Court and Federal Magistrates Court, while not explicitly providing for own-motion discretion, appear to allow the Court that option. They are couched in terms of allowing the court to make an order but make no reference to an application by a party. On the other hand, O 27 r 1 FLR provides for a party to apply, with no reference to the Court making the order on its own motion. It is unlikely that the Family Court could order a change of venue of its own motion under O 27.

### ***Structuring the discretion***

3.32 The discretion to change venue in federal courts is largely unstructured, except in the case of the Family Court. The Family Law Rules list three factors: availability of a court to hear the proceedings, the convenience of the parties, and the limiting of expense and the costs of the proceedings.<sup>29</sup> It would be possible to list additional criteria in an exhaustive or non-exhaustive list. These factors might include: the residence or place of business of parties and witnesses; the convenience for the production of any necessary documentary material; expense to the parties and their capacity to meet such expense; the place where the cause of action arose; the effective administration of justice; the convenience of the court and compliance with its case management processes; the time within which the matter may be heard within different registries; the availability of the parties' legal representatives of choice; and the existence of a jurisdiction clause.

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26 The cases to which Finkelstein J referred were *Huddart Parker v The Ship 'Mill Hill'* (1950) 81 CLR 502; *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577; and *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197.

27 *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114.

28 [1998] FCA 601 (15 May 1998), 7.

29 O 27 r 3 FLR.

***Imposing conditions***

3.33 The change of venue power for the High Court, Federal Court and Federal Magistrates Court makes explicit reference to the discretion of the court to impose conditions when granting the order. The case law gives little guidance as to the manner in which this discretion is exercised. For example, it is not clear whether the discretion can extend to directions as to the substantive and procedural law, evidentiary matters, or the future conduct of the matter. It might be argued that the power to impose conditions is unnecessary because the matter is still being heard by the same Court. On the other hand, the capacity to impose conditions might be useful in some cases where the Court decides that a change of venue is warranted but only in particular circumstances. Examples might include undertakings as to costs or the return of the proceeding to the original venue upon the occurrence of certain events.

***Choice of law considerations***

3.34 Section 79 JA provides that the laws of each state or territory, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or Commonwealth laws, be binding on all courts exercising federal jurisdiction in that state or territory in all cases to which they are applicable. Section 79 is further considered in Chapter 6.

3.35 Section 80 JA should also be noted because it deals with matters in respect of which Commonwealth law does not apply. The section states that so far as Commonwealth laws are not applicable or are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and relevant state or territory statute law shall govern all courts exercising federal jurisdiction.

3.36 A change of venue in some cases might mean that the substantive or procedural law to be applied will change because of the differences in relevant law between states and territories. In *John Pfeiffer Pty Ltd v Rogerson*, the High Court said that in a case concerning a tort committed in Australia in respect of which a federal, state or territory court is exercising federal jurisdiction, the existence, extent and enforceability of the rights and obligations of the parties may be affected significantly by where the court sits.<sup>30</sup>

3.37 The change of venue provisions of the High Court, Family Court and Federal Court do not deal with this issue and it has not been considered to a great extent in the case law on these provisions. The Full Court of the Federal Court in *National Mutual Holdings Pty Ltd v Sentry Corporation* referred to s 79 JA and said:

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30 (2000) 172 ALR 625, 641–2. This case is discussed further in Ch 6.

Difficult questions arise where the relevant law in more than one State or Territory of Australia differs in effect on the rights of the parties. The weight to be given to this factor in determining motions to continue a proceeding at a different place will be considerable where the differences between the two States or Territories are material and affect significantly the rights of the parties. In some cases, however, it will be difficult for the Court to assess at an early stage of a proceeding whether the differences between the two laws will affect the rights of the parties. The effect of differences between the applicable laws may depend, for example, upon the exercise of discretion of the Court at the trial. It may be that the facts upon which any differences in law will operate will be known only in general terms, for example, as pleaded, at the time the Court is asked to change the place at which the proceeding is to be heard. These are matters that the Court must consider in each case when it becomes relevant to do so.<sup>31</sup>

3.38 The Full Court in *Sentry* drew some assistance from the High Court's interpretation of its remittal power under s 44 JA (see paragraphs 3.143–3.151), noting that the High Court majority in *Pozniak v Smith*<sup>32</sup> had decided that in a case where there were material differences between the competing jurisdictions the 'only safe course' was to remit to the state whose law has given rise to the cause of action. However, the Full Court of the Federal Court in *Sentry* considered that, while the power of the High Court to remit to other courts under s 44 JA was 'analogous' to the Federal Court's power to change venue under s 48 FCAA, the 'character of these powers is ultimately different' because the Federal Court's power is concerned with whether a proceeding or part thereof should be conducted or continued at a particular place. The Full Court did not draw the same conclusion in relation to its change of venue power as the High Court had done in *Pozniak v Smith* in relation to its remittal power. Instead it preferred a broader test — where can the case be conducted or continued most suitably, bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the court?<sup>33</sup>

### ***Change of venue in state courts exercising federal jurisdiction***

3.39 No federal law currently confers on state courts a power to change venue within that state when those courts exercise federal jurisdiction. Nor does federal law provide such a power in relation to the territories. State and territory courts have their own change of venue provisions, though the terms in which those powers are conferred vary from state to state. Under s 79 JA, these state provisions would apply to matters in respect of which federal jurisdiction is being exercised. One view is that it would be desirable to have one set of change of venue rules for all cases involving the exercise of federal jurisdiction to achieve greater consistency in process and outcome in such cases across the country. This would enable uniform criteria to be developed for change of venue. However, such a

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31 (1988) 19 FCR 155, 163.

32 (1982) 151 CLR 38.

33 (1988) 19 FCR 155, 162.

change may not have great practical significance because a change of venue within a state will not alter the applicable law. Greater consistency in the treatment of cases across Australia could also be significantly increased by consistent choice of law rules. This is discussed further in Chapter 6.

### *Transfer within the United States District Courts*

3.40 Useful comparisons can be found in the procedures for transferring proceedings within the United States District Courts. In the United States, 28 USC s 1404(a) provides that

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

3.41 This provision allows a federal district court to transfer a matter to another federal district court. It is a transfer between courts of equal status having limited territorial jurisdiction within the United States. The United States courts have interpreted s 1404(a) broadly to codify or pre-empt the doctrine of *forum non conveniens*.<sup>34</sup> The courts have interpreted the criterion of the ‘interest of justice’ to include access to proof, cost to parties, availability of judicial process, maintenance of sound judicial administration and proper conservation of judicial resources.<sup>35</sup> Weighing the interests of justice includes considering the plaintiff’s choice of forum; reducing practical problems to make trials easier, more expeditious and inexpensive; and public interest factors such as relative congestion of court dockets and choice of law considerations.<sup>36</sup>

**Question 3.6.** Who should have the power to initiate a change of venue — the parties, the court of its own motion, or both of these?

**Question 3.7.** Should the discretion to change the venue of a proceeding be structured by legislation or should it remain unstructured (as at present)? If the former, what factors should be specified as relevant? Should these factors be inclusive or exhaustive?

**Question 3.8.** What, if anything, should change of venue provisions state in relation to the weight to be given to contractual jurisdiction clauses?

<sup>34</sup> See 28 USCA s 1404 Note 3; *Mitchell v Gunlach* 136 F Supp 169 (1955).

<sup>35</sup> *Burstein v Applied Extrusion Technologies Inc*, 829 F Supp 106 (1992). See also 28 USCA s 1404 Notes 2, 7, 37 and 81.

<sup>36</sup> 28 USCA s 1404 Notes 81–180.

**Question 3.9.** Should the court ordering a change of venue have power to impose conditions on the transfer? If so, should these conditions be limited to matters of procedure or extend to directions as to the substantive law to be applied?

**Question 3.10.** What is the appropriate relationship between a provision permitting a change of venue and s 79 of the *Judiciary Act*?

**Question 3.11.** Should federal law continue its current practice of conferring a power to change venue only on federal courts, or should such a power be extended to state courts exercising federal jurisdiction and territory courts exercising jurisdiction under Commonwealth laws?

### **Transfers within a court: single judge to full court**

3.42 In each of the High Court, Federal Court and Family Court, a single judge may state a case for the consideration of a Full Court. This transfers some or all of the case to the Full Court for determination. The Full Court may provide answers to specific questions which the trial judge can then apply. Some statutory provisions specifically refer to the reference of legal questions, while others simply refer to ‘questions’. Issues referred often concern complex or contentious legal questions. In each case, legislation permits the transfer of a matter before final judgment is given at trial. As a result, the transfer process bypasses the usual appellate process and results in a Full Court exercising original jurisdiction in respect of the matter so transferred. As indicated below (see paragraph 3.104), most state Supreme Courts possess similar powers.

3.43 Powers of transfer are intended to allow a trial judge to seek timely and authoritative determinations. Transfer may in some circumstances assist in obtaining early precedents from multi-member courts to help resolve other similar cases. However, because such transfers bypass the usual process of appeals from a trial judge to a Full Court, courts have often urged considerable caution in their use.

3.44 Currently, there is a significant divergence in the nature and form of transfer powers within the High Court, the Family Court and the Federal Court. For example, there are differences as to who has power to make the transfer and the circumstances in which a transfer can be made. This section discusses the transfer power in each of these courts. However, it is first necessary to consider the constitutional validity of such transfers.

## Constitutional limitations and advisory opinions

3.45 One of the consequences of the High Court's interpretation of the term 'matter' in sections 75 and 76 of the Constitution is that it is impermissible for federal courts to give advisory opinions. This was established in *In re Judiciary and Navigation Acts*, where the High Court said

we do not think that the word 'matter' in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court.<sup>37</sup>

3.46 This raises the issue whether a Full Court determination of a question put to it by a trial judge infringes the prohibition against giving advisory opinions.<sup>38</sup> The issue is made more acute by the description of the process by some judges as the giving of a 'consultative opinion'.<sup>39</sup> In *Mellifont v Attorney-General (Qld)*,<sup>40</sup> the majority of the High Court held that answers to a question of law stated for a Full Court did not infringe the constitutional requirements of a 'matter'. It is clear, however, that it is necessary for the case stated or question reserved to be sufficiently linked to the concrete administration of the law. The majority said

answers given by the full court of a court to questions reserved for its consideration in the course of proceedings in a matter pending in that court do not constitute an advisory opinion or abstract declaration of the kind dealt with in *Re Judiciary and Navigation Acts* whether or not those answers, of themselves, determine the rights of the parties. Such answers are not given in circumstances divorced from the attempt to administer the law as stated by the answers; they are given as an integral part of the process of determining the rights and obligations of the parties which are at stake in the proceedings in which the questions are reserved. Once this is accepted as indeed it must be, it follows inevitably that the giving of answers is an exercise of judicial power because the seeking and the giving of answers constitutes an important and influential, if not decisive step in the judicial determination of the rights and liabilities in issue in the litigation. Viewed in this context, it matters not whether the giving of the answers is, as a matter of legal theory, a binding determination.<sup>41</sup>

## High Court of Australia

3.47 Under s 18 JA, a single justice of the High Court may state any case or reserve any question for the Full Court of the High Court or may direct any case or question to be argued before the Full Court. In its original form, s 18 allowed a judge of the Supreme Court of a state exercising federal jurisdiction the same

<sup>37</sup> (1921) 29 CLR 257, 265.

<sup>38</sup> See H Burmester 'Limitations on federal adjudication' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 235–245.

<sup>39</sup> *O'Toole v Charles David Pty Ltd* (1990) 96 ALR 1, 14 (Brennan J).

<sup>40</sup> (1991) 173 CLR 289.

<sup>41</sup> *id.*, 303.



power to transfer a matter to a Full Court of the High Court as was possessed by a justice of the High Court. The power of a Supreme Court judge to transfer matters to the Full Court of the High Court was repealed by the *Judiciary Amendment Act 1976* (Cth) so that inter-court transfers between the two courts are no longer permitted.

3.48 Section 18 identifies three methods by which a case may be brought before the Full Court, namely, as a case stated, a question reserved, or a direction that any case or question be argued before a Full Court. The case law on the meaning of these three methods is limited and there is little guidance as to what distinguishes each method from the others.

3.49 The interpretation of the section is made more complex by the existence of an additional source of transfer contained within the High Court Rules. Order 35 r 1 HCR allows the parties by agreement to state a special case for the opinion of the Full Court, and O 35 r 2 enables the Court or a justice to direct a question of law to be raised for the opinion of the Full Court.

3.50 Neither s 18 nor O 35 refers to the other and there is a degree of overlap in their terms and scope. Section 18 refers to a ‘case stated’ while O 35 refers to an agreement ‘to state a special case’. Section 18 allows a justice to ‘reserve any question’ while O 35 allows the Court or a justice ‘to direct a question of law’. The case law does not set out clear criteria for the exercise of these discretions.

3.51 The High Court’s *Annual reports* do not separate data on the numbers of cases stated or questions reserved pursuant to the *Judiciary Act* but it is clear from the available information that the numbers are low. The 1999–2000 *Annual report* records that only six matters in that year were classified as a ‘Constitutional and other Full Court matter’. This category includes matters proceeding to hearing by way of a case stated or questions reserved pursuant to s 18, as well as demurrers and causes removed pursuant to s 40.<sup>42</sup> The figures for previous years are 1998–99: one; 1997–98: four; 1996–97: six; 1995–96: five; 1994–95: ten and 1993–94: eleven.<sup>43</sup>

### ***Case stated***

3.52 A case stated includes the facts found by the justice of the High Court or agreed between the parties and will set out the legal questions to be answered. Cases stated are answered usually in the exercise of the High Court’s original jurisdiction. According to a former High Court Registrar, Frank Jones, in the past the usual process was for the justice to find the relevant facts and then formally to

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42 High Court of Australia *Annual report 1999–2000*, 63.

43 High Court of Australia *Annual report* various years.

state a case for the consideration of the Full Court of the High Court. However, with the increase in the Court's workload the preferred practice now is for the parties to agree to the facts or for fact finding to be remitted to a lower court pursuant to s 44.<sup>44</sup>

3.53 In *R v Rigby* the High Court enunciated the following principles in relation to a case stated under s 18:

Upon a case stated the court cannot determine questions of fact and it cannot draw inferences of fact from what is stated in the case. Its authority is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties.<sup>45</sup>

3.54 However, the Full Court may draw implications from what is expressed in the stated case. In *Merchant Service Guild of Australia v Newcastle & Hunter River Steamship Co Ltd*, Isaacs J explained the difference between inferences and implications as follows:

An implication is included in what is expressed: an implication of fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not stated in express terms. But an inference is something additional to the statements. It may or may not reasonably follow from them: but even if no other conclusion is reasonable, the conclusion itself is an independent fact; it is the ultimate fact, the statement upon which it rests however weak or strong being the evidentiary or subsidiary facts.<sup>46</sup>

3.55 In *R v Rigby* the High Court approved the distinction drawn by Isaacs J between inferences and implications.<sup>47</sup>

3.56 It is clear that the stated case must particularise the issues in question so that the Full Court has before it all the information and evidence it needs to make its determination. In *A v Hayden*,<sup>48</sup> Mason J in dealing with a stated case from Dawson J in respect of matters arising out of raid by the Australian Secret Intelligence Service (ASIS) at the Sheraton Hotel in 1983 (see Chapter 8) commented that the form of a stated case needs to set out the evidence that is necessary to determine the issues involved in the case.

44 F Jones 'The story behind the headlines: constitutional procedures' (1994) 12 *Australian Bar Review* 149, 151.

45 (1956) 100 CLR 146, 150–151. See also *Brisbane City Council v Valuer-General (Qld)* (1978) 140 CLR 41; *Caltex Ltd v Federal Commissioner of Taxation* (1960) 106 CLR 205, 221.

46 (1913) 16 CLR 591, 624.

47 (1956) 100 CLR 146, 151.

48 (1984) 156 CLR 532, 550–551.

***Questions reserved***

3.57 Kitto J defined ‘any question’ in s 18 as follows:

The expression ‘any question’ means, necessarily, any question arising in the matter which the Justice is engaged in hearing; the section cannot intend to enable questions to be referred and decided that are foreign to that matter, for if it did it would be in excess of any legislative power of the Parliament.<sup>49</sup>

3.58 The reservation of a question under s 18 can be made where one or both parties request it (although the parties’ consent is not mandatory) and the single justice considers that the case merits the consideration of the Full Court.<sup>50</sup> Section 18 is unlikely to be used if the case involves only questions of fact.<sup>51</sup>

3.59 A question reserved will often be used in preference to a case stated where it is unnecessary to include a formal statement of facts for the Full Court, for example, where the facts are not at issue,<sup>52</sup> a lower court has found them, or the parties have agreed on a statement of facts and wish to have certain questions arising from them answered by the High Court.<sup>53</sup> Questions reserved are thus likely to concern pure questions of law. Questions of law answered by the High Court may save costs and time for parties and the Court. This is particularly so if the answer to the questions will resolve some or all of the issues in the case or if the answers may form the basis of a settlement between the parties.

***Order 35 special cases***

3.60 Order 35 HCR enables the parties to a proceeding to concur in stating questions of law arising in the proceedings in the form of a special case for the opinion of the High Court or of the Full Court. Order 35 is specifically limited to questions of law.

3.61 It would appear that the Court has a discretion to refuse to hear a special case, although the Order does not make this explicit and the case law has not dealt with the issue. If the parties by agreement were able to dictate the form in which the matter came before the court, the Court’s case management procedures could potentially be undermined.

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49 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 378.

50 *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353, 371–372.

51 *ibid.*

52 *New South Wales v Commonwealth* (1990) 169 CLR 482.

53 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182.

3.62 Special cases under O 35 are similar in content and process to a case stated under s 18. However, there are two significant differences: the parties in agreement initiate the process under O 35, whereas this is done by a justice under s 18;<sup>54</sup> and O 35, unlike s 18, provides that the Court may draw inferences of fact and law from the facts and documents stated in the special case which might have been drawn from them if proved at trial.<sup>55</sup>

3.63 The location of this additional power in O 35 raises the issue whether the power should be relocated to primary legislation, namely, the *High Court of Australia Act* or the *Judiciary Act*. Questions of location are discussed further in Chapter 8. A report of the Administrative Review Council has indicated that factors favouring the location of provisions in primary rather than delegated legislation include the involvement of significant questions of policy, the impact on individual rights and liberties, and procedural matters that go to the essence of a legislative scheme.<sup>56</sup> The Commission's initial view is that the relevant provisions of O 35 should be relocated in primary legislation.

3.64 Order 35 r 2 allows the Court or a justice of the Court to direct that a question of law be raised for the opinion of the Court or the Full Court where it would appear convenient to have a question of law decided before any evidence is given or any issue of fact is determined. This can be effected either by special case or in such other manner as the Court or justice deems expedient. In *Kruger v Commonwealth*, Brennan CJ commented in relation to a direction under O 35 r 2:

As a general rule, it is inappropriate to reserve any point of law for the opinion of the Full Court before a determination of the facts that evoke consideration of that point of law or of the facts on which the answer to the question reserved may depend. In the present case, however, the manifest preponderance of convenience requires that such issues of law as can be determined before the issues of fact are litigated be referred to the Full Court for determination.<sup>57</sup>

3.65 If the Full Court determines that the facts are not sufficiently found and their determination is required, the Full Court may remit the matter for the finding of those facts.<sup>58</sup>

**Question 3.12.** How useful or necessary are the provisions enabling a single justice of the High Court to state a case or reserve a question for the consideration of the Full Court?

54 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

55 O 35 r 1(4).

56 Administrative Review Council *Rule making by Commonwealth agencies* Report 35 AGPS Canberra 1992, rec 2, para 2.33.

57 (1995) 69 ALJR 885, 889.

58 *ibid.*

**Question 3.13.** Should s 18 of the *Judiciary Act* and O 35 of the *High Court Rules* be retained separately or amalgamated? If O 35 is retained, should it be relocated to primary legislation such as the *Judiciary Act* or the *High Court of Australia Act*?

**Question 3.14.** Should O 35 of the *High Court Rules* be amended to make explicit the Court's discretion to refuse to hear a special case stated by consent of the parties?

### Family Court of Australia

3.66 Section 94A FLA provides that if, in specified proceedings, a question of law arises which the judge and at least one of the parties wish to have determined by a Full Court of the Family Court before the proceedings are further dealt with, the judge shall state the facts and question in the form of a special case for the opinion of the Full Court. The Full Court shall hear and determine the question.

3.67 The section identifies three types of proceedings to which the s 94A procedure is applicable. These are proceedings in the Family Court of Australia not before a Full Court, whether the Court is exercising original or appellate jurisdiction; proceedings in a state family court or a state or territory Supreme Court constituted by a single judge exercising original or appellate jurisdiction under the *Family Law Act*; and proceedings continued under transitional provisions in accordance with s 9 FLA.

3.68 Section 94A(2) provides that the Full Court may draw from the facts and the documents any inference, whether of fact or of law, which could have been drawn from them by the judge. In *In the Marriage of Smith and Saywell*,<sup>59</sup> Marshall SJ was of the view that the Full Court was not empowered to draw any inferences from allegations in the stated case for the reason that such allegations are not 'facts' or 'documents' within the meaning of s 94A(2).<sup>60</sup> On the other hand, Watson SJ in the same case held that 'stated facts of an interlocutory nature, as under s 94A' only required that there was 'sufficient material' before the Full Court to define the questions of law and adjudicate upon it.<sup>61</sup> According to Watson SJ, for this purpose the Full Court could draw from the facts and the documents any inference, whether of fact or of law, which could have been drawn from the same material by the trial judge.<sup>62</sup>

<sup>59</sup> (1980) 6 Fam LR 245.

<sup>60</sup> id, 254.

<sup>61</sup> id, 267.

<sup>62</sup> ibid.

3.69 The Full Court of the Family Court has held that s 94A is limited to its express provisions so that there must be proceedings on foot, which will usually involve a party making an application to the Court for an order against another party also before the Court. According to Evatt CJ the power is

to be resorted to only in exceptional circumstances, where it may be important to get a further opinion on a point of law before embarking on lengthy proceedings to determine complex facts.<sup>63</sup>

3.70 The Full Court has also remarked that s 94A is not always a satisfactory way of resolving issues but may be justified where there is a genuine preliminary point of law, the resolution of which may save time and expense and will materially affect the course of proceedings.<sup>64</sup>

3.71 It is now established that the High Court may hear an appeal from a decision of the Full Court of the Family Court on a case stated under s 94A. In *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)*<sup>65</sup> the High Court held that the decision in *Mellifont v Attorney-General (Q)*<sup>66</sup> 'effectively affirmed' the Court's power to hear such appeals.<sup>67</sup>

3.72 The High Court also held in *Re Schachter; Ex parte Harty*<sup>68</sup> that a case stated under s 94A can include constitutional questions concerning the Family Court's jurisdiction. *Schachter* concerned an application for an order nisi for a writ of prohibition directed to the judges of the Family Court of Australia. The applicant was seeking by that means to prevent the Full Court of the Family Court from hearing and determining a case stated by a single judge of the Court. The case raised constitutional questions regarding the jurisdiction of the Court in relation to costs agreements. Dawson J held that:

The Family Court clearly has the power to determine for itself, although not conclusively having regard to s 75(v) of the Constitution, whether it has the necessary jurisdiction in this case. It follows that the Full Court has power under s 94A of the *Family Law Act 1975* (Cth) to hear and determine a case stated directed to that ultimate question.<sup>69</sup>

3.73 The Family Court *Annual reports* do not contain statistical information about the use of s 94A but, in light of the comments of Evatt CJ referred to above, its use is likely to be modest.

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63 *In the Marriage of CE Daff (deceased) and GEMM Daff* (1982) 9 Fam LR 546, 548.

64 *In the Marriage of Mullane* (1980) 5 Fam LR 801.

65 (1992) 175 CLR 218.

66 (1991) 173 CLR 289.

67 Compare *Fisher v Fisher* (1986) 161 CLR 438.

68 (1989) 86 ALR 29.

69 *ibid.*

**Federal Court of Australia**

3.74 There are two mechanisms for transfer from a single judge of the Federal Court to the Full Court of the Federal Court. One is under s 20 FCAA, which enables the Chief Justice of the Court to make such a direction when he or she considers that the matter is of ‘sufficient importance’ to justify the direction. The other is under s 25(6) FCAA, which enables a single judge of the Federal Court to state a case for the consideration of a Full Court.

***Section 20 and the discretion of the Chief Justice***

3.75 Section 20 FCAA relevantly provides as follows:

20 (1) Except as otherwise provided by this Act or any other Act, the original jurisdiction of the court shall be exercised by a single Judge.  
 (1A) If the Chief Judge considers that a matter coming before the Court in the original jurisdiction of the Court is of sufficient importance to justify the giving of a direction under this subsection, the Chief Judge may direct that the jurisdiction of the Court in that matter shall be exercised by a Full Court.<sup>70</sup>

3.76 Section 20(1) allows a single judge to exercise the Court’s original jurisdiction, subject to any qualifications expressed in the FCAA or other legislation to the effect that jurisdiction is to be exercised by a Full Court.<sup>71</sup> The section has been interpreted as permissive and has not been read as precluding a Full Court from hearing a matter where the circumstances are appropriate.<sup>72</sup>

3.77 Section 20(1A) was added in 1986.<sup>73</sup> Prior to its introduction, the Chief Justice of the Federal Court effectively exercised this power under s 15(1) FCAA. This section provides that the Chief Justice is responsible for ensuring the orderly and expeditious discharge of the business of the Court and may make arrangements for the constitution of the Court in particular matters or classes of matters. While s 15 implicitly provides power to transfer, the introduction of s 20(1A) made that power explicit. Common to both provisions is the discretionary nature of the power — under s 15(1) it is a matter of discretion for the Chief Justice as to whether there are sufficient reasons for a matter to be put before a Full Court, while under s 20(1A) it is for the Chief Justice to determine whether a matter is of ‘sufficient importance’ to be considered by the Full Court.

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70 The *Workplace Relations and Other Legislation Act 1996* (Cth), Schedule 16, has the effect of substituting ‘Chief Justice’ for ‘Chief Judge’ wherever it appears in the FCAA. Accordingly, the term Chief Justice will be used instead of Chief Judge in reference to the judicial head of the Federal Court irrespective of the terms in which a particular provision was originally enacted.

71 *R v Kearney; Ex parte Attorney-General (NT)* (1984) 3 FCR 534, 538; *Trade Practices Commission v Manfal Pty Ltd* (1990) 27 FCR 284, 286.

72 *R v Kearney; Ex parte Attorney-General (NT)* (1984) 3 FCR 534, 538–39.

73 *Statute Law (Miscellaneous Provisions) Act (No 1) 1986* (Cth), Schedule.

**Section 25(6) transfers from a single judge**

3.78 Section 25(6) FCAA provides that a single judge of the Federal Court may state a case or reserve any question for the consideration of a Full Court, provided that the case or question concerns a matter with respect to which an appeal would lie from a judgment of the judge to a Full Court.

3.79 Order 50 r 1 FCR provides that a case to be stated or a question to be reserved or to be referred for the consideration of the Court must be in the form of a special case. Rule 1(2) provides that the special case is to state the facts concisely and annex all documents necessary to enable the court to decide the questions raised by the special case. Pursuant to O 50 r 1(3) the Court may draw from the facts stated and the documents annexed in the special case any inference, whether of fact or law, which might have been drawn from them if proved at trial. In this respect, the Full Court commented in *Re Alcoota Land Claim No 146* that such a power should be ‘construed narrowly as allowing a court to draw inferences only where those inferences necessarily flow from the facts stated or documents annexed’.<sup>74</sup>

3.80 In *Barton v Westpac Banking Corporation*, Sheppard J made the following general comments about the purpose and use of s 25(6).

Section 25(6) is a general provision relating to all matters that are before single judges of the Court. The majority of these will be civil and not criminal. Appeals will therefore lie by either party in most cases. It will only be if the judge considers that it is convenient to refer a question, perhaps because it raises unusual difficulties or perhaps because there are conflicting decisions — the list is not exhaustive — that a judge will normally accede to an application. Sometimes he will act of his own motion and not at the behest of the parties. Furthermore, if the request for the reservation is by the parties or one of them, the judge will have an obligation to decide whether the question is proper to be referred to a Full Court. In a number of cases I have known the judge has considered it inappropriate to refer a question and has thought it preferable to decide the case himself leaving it to the appellate processes to correct any error that has been made ... These various considerations establish that under subs 25(6) of the Court’s Act the judge has a wide discretion.<sup>75</sup>

3.81 According to Stephen, Mason and Wilson JJ in *Henderson v Pioneer Homes Pty Ltd*,

s 25(6) is concerned to confine the stating of a case and the reservation of a question to those instances in which the matter the subject of proceedings is one in which an appeal lies under s 24(1) to the Full Court of the Federal Court. Where no such appeal lies and where, instead, the single judge is to be the final arbiter, there is to be no dilution of his exclusive responsibility by any recourse being had to the Full Court by means of a stated case or the reservation of questions.<sup>76</sup>

74 (1998) 82 FCR 391, 395, citing *Fowles v Eastern & Australian Steamship Co Ltd* (1913) 17 CLR 149, 196 and *Universal Cargo Carriers Corp v Citati (No 2)* [1958] 2 QB 254, 264–265.

75 (1983) 50 ALR 397, 415.

76 (1979) 142 CLR 294, 298.



3.82 A significant issue in the interpretation of s 25(6) has been whether it applies to criminal prosecutions in which there is an acquittal after a hearing on the merits, given that the section refers to matters in respect of which an appeal would lie.<sup>77</sup> However, this issue lies outside the Commission's terms of reference, which are confined to civil matters (see Chapter 1).

3.83 The power to state a case or reserve a question to the Full Court is intended for the better administration of justice. It should, therefore, be exercised where the matter is likely to involve questions appropriate for determination in the Full Court and where it is reasonable to exercise the power.<sup>78</sup> Considerations relevant to whether a single judge should exercise the power in s 25(6) where the matter is one with respect to which an appeal would lie include

- ?? whether previous authority on the issues is clear or uncertain
- ?? the likelihood of delay, and the needs of the parties and the public generally to have the matter completed as soon as practicable<sup>79</sup>
- ?? whether the questions raised are preliminary and whether there are obvious advantages in the court dealing with them prior to trial, and
- ?? whether the importance of the questions make it appropriate that they be referred to the Full Court.

3.84 A single judge may reserve any question of law pursuant to s 25(6) at any stage of the proceedings. According to Brennan J in *O'Toole v Charles David Pty Ltd*,

A power to reserve a question to the Full Court enables a judge to obtain from that Court a ruling that the judge can apply in determining the proceedings. The answer itself may not conclude an issue in the proceedings, or a cause of action in the proceedings or the proceedings as a whole; it may amount to no more than a consultative opinion to be applied in the determination of the proceedings by the judge who reserves the question.<sup>80</sup>

3.85 However, the Full Court of the Federal Court has also sounded a cautionary note in using the case stated procedure. In *Re Alcoota Land Claim No 146*, the Full Court remarked that

[t]he case stated procedure ought not to be adopted where there are disputed questions of fact that impinge upon the question or questions of law reserved for determination. Nor is it appropriate where the answer to the question depends upon the impact of detailed and complex findings of fact upon legal principles that are flexible in their application and therefore inextricable from those facts.<sup>81</sup>

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77 *Henderson v Pioneer Homes Pty Ltd* (1979) 142 CLR 294; *Thompson v Mastertouch TV Service Pty Ltd (No 3)* (1978) 19 ALR 547.

78 *Henderson v Pioneer Homes Pty Ltd* (1979) 25 ALR 179, 185–187 (Smithers J).

79 *Re Adamson* (1984) 57 ALR 280, 294.

80 (1990) 96 ALR 1, 14.

81 (1998) 82 FCR 391, 394.

3.86 The Full Court went on to remark that the Court should refuse to answer a stated case unless there is in the stated case ‘a sufficient foundation in fact for the determination of the question or questions of law reserved’. In its view, courts should not give answers to hypothetical questions where relevant facts have not been determined.<sup>82</sup>

3.87 Similar cautionary remarks were also made by the High Court in *Bass v Permanent Trustee Co Ltd*.<sup>83</sup> In that case, Wilcox J of the Federal Court had referred six preliminary questions of law to the Full Court of the Federal Court. The matter went on appeal to the High Court, which, in considering the Full Court’s responses to these questions, commented that special problems can occur where the preliminary question is one of fact and law.<sup>84</sup> Precision is needed in formulating the question and specifying the facts upon which it is to be decided. A failure to identify relevant facts can not only render the exercise unfruitful but also lead to courts going beyond judicial process and effecting a determination of rights by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case.<sup>85</sup>

### **Assessing the case stated and other intra-court transfer powers**

3.88 As can be seen from the discussion above, existing legislation contains considerable diversity in the manner in which it permits transfers within a court. The *Judiciary Act* allows a single High Court justice to state a case to the Full Court of the High Court with no preconditions as to the nature or significance of the matter, and the High Court Rules permit the parties by agreement to state a case to the Full Court. A Federal Court judge is also able to state a case to the Full Court of the Federal Court provided the case or question concerns a matter with respect to which an appeal would lie from a judgment of the judge to a Full Court. The Federal Court is the only court of the three discussed that allows the Chief Justice the opportunity to transfer cases considered to be of ‘sufficient importance’. The Family Court’s transfer power requires a ‘question of law’ that the judge and at least one of the parties wish to have determined by a Full Court of the Family Court.

### ***Relationship to the appellate process***

3.89 One issue to consider is the appropriate relationship between the respective transfer powers and the power of a Full Court to hear a similar matter on appeal. The Federal Court transfer provision is the only provision that expressly links the transfer power to the appellate process — s 25(6) FCAA provides that transfer can

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<sup>82</sup> id, 394–395.

<sup>83</sup> (1999) 198 CLR 334.

<sup>84</sup> id, 358.

<sup>85</sup> id, 359.

only take place if a case or question concerns a matter with respect to which an appeal would lie from a judgment of the judge to a Full Court. An argument for restricting transfer to appellable matters is that it helps to ensure that only significant matters are the subject of transfer and the Full Court is therefore less likely to receive matters that do not warrant the procedure. On the other hand, a transfer power unrestricted to appellable matters might assist the lower court to resolve quickly matters of law, practice or procedure that may not be subject to appeal.

3.90 In practice, the situation in the High Court and the Family Court may be little different from that in the Federal Court in this respect, because in both courts there is a right to appeal a decision of a single judge to a Full Court (see Chapter 4). As a result, a case stated by a single judge would generally be one in respect of which an appeal would lie to a Full Court if the case had instead proceeded to judgment. Thus s 34(1) JA grants the High Court jurisdiction to hear and determine appeals from all judgments of any justice of the High Court exercising original jurisdiction, and by s 20 that appellate jurisdiction must be exercised by a Full Court. The situation is similar in relation to the Family Court. Under s 94 FLA an appeal lies to the Full Court of the Family Court in relation to a decree of the Family Court, constituted otherwise than as a Full Court, exercising original or appellate jurisdiction. The same appellate process applies to decrees of a Family Court of a state or a Supreme Court of a state or territory constituted by a single judge exercising original or appellate jurisdiction under the *Family Law Act*.

3.91 There is also a more general issue to consider, namely, the extent to which ordinary appellate processes may be circumvented by a procedure for internal transfer within a court before final judgment is given at trial. Policy considerations relevant to this issue are the extent to which an internal transfer system

- ?? burdens the Full Court's caseload and case management
- ?? bypasses the usual processes for screening appeals
- ?? deprives the Full Court of the benefit of the trial judge's opinion
- ?? determines a matter prematurely before relevant facts have been found, or
- ?? interrupts the orderly disposition of cases at trial.

### ***Structuring the discretion***

3.92 A further issue is the extent to which the discretion to state a case or refer a question should be structured in primary legislation. One approach is that the transfer power of each federal court should be very flexible, with the capacity for a single judge or a Chief Justice to order transfer to a Full Court without preconditions as to the nature or significance of the issue. On this view, the parties should also be able to make a formal application to transfer a matter to the Full Court. This approach provides the greatest opportunity for intra-court transfers but places considerable reliance on the trial judge or the parties to identify appropriate circumstances for transfer.

3.93 An alternative approach is that the transfer power should be framed more restrictively, both as to who can invoke it and the circumstances in which this can be done. This approach is premised on the view that trial judges and litigants may not be in the best position to determine whether transfer is appropriate and likely to reduce costs. For example, there may be inadequate disclosure of relevant facts, factual circumstances may change, or the relevant legal issues may not be adequately identified. If a decision to transfer is made and the Full Court determines that it is not in a position to determine the issues put to it, further time will have been expended for no discernible gain. Furthermore, intra-court transfers impact on the workload and case management of the Full Court, and trial judges may not be in an effective position to assess this impact. On this view, the power to transfer should be used sparingly and a trial judge's discretion to order a transfer should be suitably structured. The normal appellate process would still be available to remedy any defects in the trial process.

3.94 The ability of a single judge to assess the impact of stated cases on the work of the Full Court might vary significantly. In the High Court, where single justices invariably sit on the Full Court, whether exercising original or appellate jurisdiction, this awareness is probably acute.

3.95 In relation to the Family Court, s 28(3A) FLA provides that the jurisdiction of the Court to hear and determine a case stated under s 94A shall be exercised by a Full Court. Section 4 FLA defines a 'Full Court' to mean three or more judges of the Family Court sitting together, where a majority of those judges are members of the Appeal Division. Thus Family Court judges, who number approximately 50, may have varying levels of awareness of the caseload and workings of the Full Court, depending on the degree of their involvement in the appellate process.

3.96 In the Federal Court, appeals are heard by panels of trial judges sitting in rotation. Section 14 FCAA provides that a Full Court ordinarily consists of three or more judges sitting together, or in special circumstances two judges sitting together. There are currently 50 Federal Court judges, including the Chief Justice.<sup>86</sup> Their individual awareness of Federal Court appellate workload issues may also vary according to their involvement in the appellate process.

3.97 Another issue in this context is whether a Full Court ought to have some input in screening cases stated in light of the effect of these cases on their workload. This might depend on a pragmatic assessment of how frequently this procedure is used. One option might be to require the leave of the Full Court to bring a case stated to it, in a like manner to the provision in s 35A JA for special leave to appeal to the High Court. Thus, in the same way as Chapter 4 questions the appropriateness of the Full Court of the Family Court certifying a matter for the

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86 Federal Court of Australia *Annual report 1999–2000*, 3.

High Court's attention under s 95(b) FLA, so one might question the appropriateness of a single judge invoking intra-court transfer procedures that impact on the workload of the Full Court.

3.98 A number of judges have expressed concern with the use of case stated procedures. In *Brisbane City Council v Valuer General (Qld)*, Murphy J commented:

The lengthy argument in this appeal concerning the effect of the case stated illustrates the disadvantage of that procedure. Except in very simple cases, it generally introduces complications that obscure the real points to be decided. Whatever its theoretical merits, in practice it is one of the worst legal techniques. Invoking the stated case procedure generally results in a legal snarl. Sometimes this is due to careless statement of the case, but often it happens because even with care it is not easy to predict which findings an appellate court will consider necessary or relevant.<sup>87</sup>

3.99 Similarly, Lord Evershed MR said in the English Court of Appeal in relation to a preliminary point of law set down in the Chancery Division:

the course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom — save in very exceptional cases — of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted inevitably turns out to be the longest way around.<sup>88</sup>

3.100 In *Re Alcoota Land Claim No 146*, the Full Court of the Federal Court said that comments such as those made by Murphy J and Lord Evershed MR reinforce the view that

such procedure is more often than not productive of difficulty, delay, artificiality, and injustice and should be adopted cautiously and in only the clearest and simplest cases ... The problems inherent in these procedures are exacerbated when the court is asked to determine questions of law on incomplete facts, or on assumptions, or in circumstances which render it impossible to answer the questions in other than a hypothetical fashion.<sup>89</sup>

3.101 If a more structured approach is adopted then choices must be made about who can direct transfer and what preconditions should apply. One possibility is to include in legislation a non-exhaustive list of factors that must or may be taken into account in deciding whether or not to transfer. The list might include: whether previous authority on the issues is clear or uncertain; the likelihood of additional costs and delay if there is no transfer; the needs of the parties and the public generally to have the matter resolved as soon as practicable; whether a genuine preliminary question of law is raised, the resolution of which will materially affect

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87 (1978) 140 CLR 41, 61.

88 *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375, 396.

89 (1998) 82 FCR 391, 394.

the outcome of the case; whether there are clear advantages in the court dealing with the particular issues before trial; and whether the importance of the questions make it appropriate that they be referred to the Full Court.

### ***Powers of a Full Court in transferred matters***

3.102 Another issue is what provision should be made in relation to the powers of a Full Court in transferred cases. Section 18 JA and O 35 HCR embody slightly different approaches: under s 18 a Full Court can draw implications but cannot draw inferences; under O 35 a Full Court can draw inferences. Section 94A FLA allows the Full Court of the Family Court to draw such inferences from the facts and the documents as could have been drawn by the judge. Order 50 FCR also allows the Full Court to draw inferences in a special case stated.

3.103 It is questionable whether a court should have two co-existing but different approaches to this issue, as the High Court currently has. A further issue is what is the best approach to the powers of a Full Court in such circumstances. On one view a Full Court should be free to draw inferences provided it has sufficient material before it to do so — a court should exercise its powers in transferred cases so that it can give the most accurate and comprehensive response to a lower court. The alternative view is that a Full Court may not be in an effective position to assess the totality of facts and evidence and should therefore be restricted in the conclusions it draws from the facts.

### ***A uniform approach across jurisdictions?***

3.104 A final issue is whether the current divergence in approach to intra-court transfer is justified or whether a uniform approach to transfer is possible and desirable. Uniformity might be sought either across all federal courts or across all courts exercising federal jurisdiction and jurisdiction under Commonwealth laws. The latter view would substitute a uniform federal rule for diverse provisions of state and territory law regarding cases stated and questions reserved, in respect of those matters falling within federal jurisdiction.<sup>90</sup>

3.105 A uniform approach might be seen as useful because it may be more accessible and convenient for users of the system, such as legal practitioners and litigants in person, and it might aid in the development of common precedents across jurisdictions. On the other hand, it could be argued that each court has its own particular jurisdiction, workload and users, and that uniformity is not needed or even desirable. For example, it might be argued that High Court justices do not need structured discretions to transfer matters from a single justice to a Full Court

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90 Compare *Supreme Court Act 1933* (ACT) s 13; *Supreme Court Act 1935* (SA) s 49; *Supreme Court Act 1995* (Qld) s 251; *Supreme Court Act 1935* (WA) s 43; *Supreme Court Act 1986* (Vic) s17B; *Supreme Court Rules 2000* (Tas) r 566; NSW Supreme Court Rules Part 12.

because they are justices of the Australia's highest court and can be relied upon to exercise a broad discretion with a very high level of expertise. A different approach may be warranted for other courts.

**Question 3.15.** What is the appropriate relationship between (a) the power of a Full Court to hear a matter in its original jurisdiction on a reference or case stated from a single judge and (b) the power of a Full Court to hear a similar matter on appeal?

**Question 3.16.** Who ought to have power to transfer a matter from a single justice to a Full Court — the trial judge, the Chief Justice, the Full Court, the parties, or some combination of these?

**Question 3.17.** Should the Full Court to which a reference or case stated is taken be given the power to screen such cases, for example through a leave procedure?

**Question 3.18.** Should the Full Court be given an express power to decline to answer a case stated or a question reserved where it considers it inappropriate to do so?

**Question 3.19.** Should legislation set preconditions on the exercise of the power to refer a matter to a Full Court, such as the Family Court requirement in s 94A of the *Family Law Act* that the referral be on a question of law?

**Question 3.20.** Should legislation structure the exercise of the discretion, as with the Federal Court requirement in s 20 of the *Federal Court of Australia Act* that the matter be one of 'sufficient importance', or should the discretion be left at large? If the discretion should be structured, what criteria should be used?

**Question 3.21.** What provision should be made in relation to the range of documents and other material that a Full Court may consider, and how the Court is to identify facts and draw conclusions from them?

**Question 3.22.** Should the same legislative provision be made for all federal courts, on the one hand, or for all courts exercising federal jurisdiction or jurisdiction under Commonwealth laws, on the other?

## Transfers between courts: cases stated and questions reserved

3.106 An appeal is the standard method by which a decision of one court is reviewed for error by a court higher in the judicial hierarchy. However, legislation sometimes provides alternative mechanisms for a higher court to consider a matter before final judgment is given in the lower court. The use of cases stated and questions reserved have already been discussed in relation to matters arising within a single court. More unusually, however, legislation may provide for a case to be stated between different courts. This type of provision allows a lower court to refer cases to a higher court outside the usual appellate process. It has an important parallel in the High Court's power to remove a cause pending in a lower court pursuant to s 40 JA, as discussed in paragraphs 3.161–3.191.

### Inter-court transfers to the High Court

3.107 Section 18 JA, when originally enacted, enabled any judge of a state Supreme Court exercising federal jurisdiction to state a case or reserve any question for the consideration of a Full Court of the High Court. In 1976 this section was amended to remove the power<sup>91</sup> — the current s 18 reserves to a single justice of the High Court the privilege of stating cases or reserving questions for a Full Court of that Court.

3.108 The only legislative provision that currently allows a form of inter-court reference to the High Court is the power granted to the Family Court under s 95(b) FLA to grant a certificate of appeal to the High Court. Section 95(b) allows an appeal to be taken to the High Court from a decree of a Family Court, whether in the exercise of original or appellate jurisdiction, 'upon a certificate of a Full Court of the Family Court that an important question of law or of public interest is involved'. This provision differs from the former s 18 JA and from the power of removal in s 40 JA in an important respect. It is premised on the existence of a final decision of the Family Court, but enables the usual special leave requirements of the High Court to be bypassed. As such, s 95(b) has been said to constitute 'a unique power so far as intermediate appellate courts are concerned in this country'.<sup>92</sup> The High Court, when hearing a family law matter pursuant to a s 95(b) certificate, exercises appellate jurisdiction. Accordingly, this matter is dealt with in detail in Chapter 4, including a discussion of the recent High Court decision in *DJL v Central Authority*.<sup>93</sup>

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91 *Judiciary Amendment Act 1976* (Cth).

92 *Laing v Director General, Department of Community Services New South Wales* (1999) 24 Fam LR 623, 627 (Nicholson CJ).

93 (2000) 170 ALR 659.



3.109 An issue that arises in the present context is whether s 18 JA should be returned to its original form so that state Supreme Courts exercising federal jurisdiction could state a case or reserve a question for the Full Court of the High Court. Such a power could also be extended to judges of the Federal Court and the Family Court.

3.110 The argument for such a change is that this might reduce delays and costs in cases that are likely to reach the High Court in any event, or that raise significant issues of law that are best dealt with by the High Court as expeditiously as possible. On the other hand, such a change could significantly reduce the control that the High Court has over its caseload and priorities. The consequent avoidance of the special leave requirement in s 35A JA might be ameliorated by imposing a leave requirement on the inter-court reference process itself. Parties might otherwise be involved in unnecessary proceedings and additional costs if the matter were not appropriately referred to the High Court. The Commission's preliminary view is that the removal power in s 40 JA, if appropriately fine-tuned, provides an adequate mechanism by which important matters might be brought to the High Court before a final decision has been made. That mechanism has an advantage over an expanded inter-court transfer procedure as it allows the High Court to regulate the volume and content of its caseload.

### **Inter-court transfers to the Federal Court**

3.111 Section 26 FCAA enables a court from which appeals lie to the Federal Court to state a case or reserve any question to the Federal Court. Under s 26, the Federal Court must have jurisdiction to hear and determine the case or question so referred. A court referred to under s 26 is not to state a case or reserve or refer a question to a court other than the Federal Court. If the referring court under s 26 is a court of summary jurisdiction, the power to hear a stated case or determine a question may be exercised by one Federal Court judge or by a Full Court. If the referring court is not a court of summary jurisdiction, a Full Court of the Federal Court must exercise the power.

3.112 Appeals to the Federal Court lie from a judgment of the Federal Magistrates Court (s 25(1A) FCAA) or from certain judgments of the Supreme Court of a territory (s 25(3) FCAA). Section 26 thus takes into account the fact that a channel of appeal lies to the Federal Court from certain decisions of a single judge of a Supreme Court of a territory and it permits the regular appellate process to be shortcut by the referral process in appropriate cases. Under s 26 FCAA, a single judge of a state Supreme Court may also state a case for the Federal Court in respect of matters in which an appeal would lie to the Federal Court. Specific legislation may provide for such an appellate route from a state Supreme Court, notably in the intellectual property area. Appeals from judgments of state Supreme Courts to the Federal Court are discussed further in Chapter 4.

3.113 The law relating to cases stated and questions reserved for the Full Court by a single judge of the Federal Court pursuant to s 25(6) FCAA is discussed at paragraphs 3.74–3.87. Similar principles are likely to apply to the operation of inter-court transfers under s 26.<sup>94</sup>

3.114 Section 26 raises issues about the appropriateness of inter-court transfers by means of a case stated or question reserved. The circumstance that, under s 26, it is *another* court that makes the transfer might increase the concern that transfers may be made without sufficient awareness of the caseload and priorities of the recipient court, in this case, the Federal Court.

**Question 3.23.** Who should be given authority to initiate or determine the transfer of a matter from one court to another by means of a case stated: the parties, a single judge of the transferring court, a Full Court of the receiving court, or some combination of these?

**Question 3.24.** According to what criteria should an inter-court transfer be made? Should the issues transferred necessarily be questions of law or matters of public importance? Should these criteria be left to judicial development or embodied in legislation? If the latter, should the criteria be exhaustive?

**Question 3.25.** When is it appropriate for the usual appellate process to be circumvented by the transfer of a matter from one court to another court before final judgment?

**Question 3.26.** Should s 18 of the *Judiciary Act* be amended to allow a judge of the Federal Court, the Family Court, a state Supreme Court exercising federal jurisdiction, or a territory Supreme Court exercising jurisdiction under Commonwealth laws to state a case or reserve a question for the High Court?

**Question 3.27.** What change, if any, should be made to s 26 of the *Federal Court of Australia Act*, which allows courts from which an appeal would lie to the Federal Court to state a case or reserve a question for the Federal Court?

94 CCH Australia Ltd *Australian High Court and Federal Court practice* Vol 2 Federal Court, para 21–560.

## **Transfers between courts: remittal from a higher court to a lower court**

3.115 The terms of reference ask the Commission to consider the ‘operation of Part VII of the *Judiciary Act* and particularly the workings of s 44 dealing with remittal of matters by the High Court to other courts’. Part VII concerns removal of causes into the High Court (sections 40–43) and remittal of matters by the High Court to other courts (sections 44–45). Removal is discussed in paragraphs 3.161–3.191.

3.116 The High Court has original jurisdiction conferred on it directly by the Constitution (s 75). It also has such additional federal jurisdiction as is conferred on it by Parliament in those matters enumerated in s 76. While Parliament has great latitude in determining the extent of the High Court’s s 76 jurisdiction, its s 75 jurisdiction cannot be abridged except by constitutional amendment. There appears to be reasonable consensus that some heads of original jurisdiction listed in s 75 are inappropriate for the highest court in the land, which should focus its attention on matters of constitutional law and other legal questions of public importance. An example of an inappropriate head of original jurisdiction is the ‘diversity jurisdiction’ in s 75(iv) of the Constitution.<sup>95</sup>

3.117 Section 44 JA allows the High Court to remit, on the application of a party or of its own motion, matters commenced in the High Court to a more appropriate court, subject to any directions the High Court may make. The power is not restricted to matters commenced in the court’s original jurisdiction — the section speaks of ‘any matter ... that is at any time pending in the High Court’. However, the High Court’s close scrutiny of its appellate caseload pursuant to the special leave requirement in s 35A (see Chapter 4) makes it unlikely that the Court will be burdened with inappropriate appellate jurisdiction. The power of remittal in s 44 is an important mechanism by which the High Court may divest itself of those cases within its original jurisdiction that are inappropriate for the Court to determine.

3.118 Section 44 permits three types of remittal.

?? Section 44(1) is a general provision (subject to s 44(2)) that allows the High Court to remit to any federal, state or territory court that has jurisdiction with respect to the subject matter and the parties.

?? Section 44(2) permits remittal to the Federal Court or any state or territory court of matters referred to in s 38(a), (b), (c) or (d). These are matters in which the High Court would otherwise have exclusive jurisdiction and concern matters arising directly under treaty, suits between states, and suits between the Commonwealth and a state.

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95 Diversity jurisdiction is discussed in Ch 2.

- ?? Section 44(2A) enables remittal to the Federal Court of matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

### History of the power

3.119 Before 1976 the remittal power was conferred by s 45 in the same terms in which it had been originally enacted in 1903. That section permitted the High Court, on the application of a party, to remit a matter for trial to any state court that had federal jurisdiction with regard to the subject matter and the parties. The power has been broadened by a number of subsequent amendments.

3.120 In 1976 additional power of remittal was conferred pursuant to the new provision in s 44.<sup>96</sup> This allowed the High Court to remit of its own motion and to a broader range of courts, namely, to any federal court, court of a state or court of a territory that has jurisdiction with respect to the subject matter and the parties.<sup>97</sup> Remittal was also made ‘subject to any directions of the High Court’.

3.121 In 1983 the power was again extended to permit the remittal of parts of matters.<sup>98</sup> Amendments made in 1984 enabled remittal in relation to matters referred to in s 38(a), (b), (c) and (d),<sup>99</sup> and inserted s 44(2A) to make it clear that the High Court could remit matters involving the Commonwealth to the Federal Court.<sup>100</sup>

### General use of the power

3.122 Under s 44, the High Court has a broad discretion to remit any matter arising in its original (or appellate) jurisdiction. In practice, the Court has tended to remit proceedings commenced in its original jurisdiction unless they are matters arising under or involving the interpretation of the Constitution, in which case they are generally retained. In *Re Boulton; Ex parte Construction, Forestry, Mining & Engineering Union*,<sup>101</sup> Kirby J decided not to remit to the Federal Court an application for prerogative relief in relation to orders made by the Australian Industrial Relations Commission. The case raised constitutional issues that went to the ‘very basis of the jurisdiction which the Commission has exercised’, the facts were not disputed, and the case was a test case ‘with many other cases waiting in the wings’.<sup>102</sup> Kirby J added that if subordinate questions of statutory construction

96 *Judiciary Amendment Act 1976* (Cth).

97 M Pyles ‘The remission of High Court actions to subordinate courts and the law governing torts’ (1984) 10 *Sydney Law Review* 352, 356.

98 *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth) s 3 and Schedule.

99 *Judiciary Amendment Act (No 2) 1984* (Cth) s 6.

100 *Statute Law (Miscellaneous Provisions) Act (No 1) 1984* (Cth) s 3 and Schedule.

101 (1999) 73 ALJR 129.

102 *id.*, 133.

arose or unexpected factual issues were raised it would always be open to the Court to remit the matter or part of the matter to the Federal Court at a later stage.

### 3.123 In some cases even a constitutional matter might be remitted if

considerations germane to applications for special leave are apposite, for example, 'may the case in the end be decided on other grounds', 'is there a significant unresolved factual dispute', or 'although the case is "constitutional", is it really no more than the application to particular facts of an established constitutional principle'.<sup>103</sup>

### 3.124 Conversely, in rare situations the Court might decline to remit a non-constitutional matter, for example,

where the Court's decision is necessary to resolve an issue of federal law or an issue arising in the federal jurisdiction ... or where the case involves an issue which would have merited the grant of special leave if it had arisen in the appellate jurisdiction (eg where the case turns on which of the two conflicting decisions of intermediate appellate courts should be followed).<sup>104</sup>

### 3.125 Remittal cases have mainly concerned the exercise of federal diversity jurisdiction under s 75(iv) of the Constitution<sup>105</sup> or actions against the Commonwealth under s 75(iii).<sup>106</sup> Most diversity cases have involved negligence actions, often arising out of motor vehicle accidents. Cook has commented that

[t]he cases suggest that the High Court has never been particularly enthusiastic about its diversity jurisdiction — perhaps because the matters that come before it in this jurisdiction tend to be relatively trivial and time wasting and unduly to increase the workload.<sup>107</sup>

### 3.126 Pryles has also doubted the Court's enthusiasm for its diversity jurisdiction.

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<sup>103</sup> D Jackson 'The lawmaking role of the High Court' (1994) 11 *Australian Bar Review* 197, 203.

<sup>104</sup> *ibid.*

<sup>105</sup> See *Crouch v Commissioner for Railways (Qld)* (1989) 149 CLR 132; *Robinson v Shirley* (1982) 56 ALJR 237; *Johnstone v Commonwealth* (1978) 143 CLR 398; *Pozniak v Smith* (1982) 151 CLR 38; *Weber v Aidone* (1981) 36 ALR 345; *Guzowski v Cook* (1981) 149 CLR 128; *Fielding v Doran* (1984) 60 ALR 342; *Gardener v Wallace* (1995) 184 CLR 95.

<sup>106</sup> *Beecham Group Ltd v Bristol-Myers Co* (1977) 14 ALR 591; *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579; *Re Federal Commissioner of Taxation; Ex parte Bayford Wholesale Pty Ltd* (1983) 48 ALR 477; *Broken Hill Proprietary Ltd v National Companies and Securities Commission* (1986) 67 ALR 545; *McCauley v Hamilton Island Enterprises Pty Ltd* (1986) 69 ALR 271; *Bowtell v Commonwealth* (1989) 86 ALR 31; *Newcrest Mining WA Ltd v Commonwealth* (1993) 46 FCR 342; *Re Australasian Meat Industry Employees Union* (1997) 73 IR 58; *Re Jarman* (1997) 188 CLR 595; *Re Boulton*; *Ex parte Construction Forestry Mining & Engineering Union* (1999) 73 ALJR 129.

<sup>107</sup> C Cook 'Section 79 *Judiciary Act 1903* — how widely does it travel?' (1987) 17 *Federal Law Review* 199, 202.

It has sought to discourage litigants from instituting such actions in the High Court by threatening to refuse costs to a successful plaintiff or awarding costs on the lower scale of a State Court that would have been competent to hear the action.<sup>108</sup>

3.127 Pryles refers to two cases to support this comment, namely *Faussett v Carol*<sup>109</sup> and *Morrison v Thwaites*<sup>110</sup> — both now dated. On the basis of this limited evidence it is difficult to conclude that there has been a continuing policy on the part of the High Court to discourage the use of its diversity jurisdiction through costs disincentives. The Commission's preliminary view is that it would be inappropriate for the High Court Rules to facilitate the use of cost disincentives to discourage the use of the Court's diversity jurisdiction in relation to cases that are lawfully commenced pursuant to the Court's entrenched Constitution jurisdiction under s 75. Citizens ought to be able to exercise their legal rights according to the existing law without incurring cost penalties for doing so.

3.128 The Court has taken a broad and pragmatic approach to the use of its remittal power and has considered both the rights and interests of the parties and issues relating to its own workload and constitutional role. Kirby J commented on some of the uses of remittal in *Re Australasian Meat Industry Employees Union*, a case concerning remittal of a matter to the Industrial Relations Court of Australia.

Although the [High] Court has jurisdiction to deal with all such matters pursuant to the Constitution, s 75(v), its invariable practice is to remit such matters to the appropriate federal court. Doing so conserves the time of this Court. In the ordinary course, it ensures a much earlier hearing of the substance of the matter. And it provides avenues for appeal or further redress, including in this Court, which the Constitution and the applicable legislation afford, but with the reasoned opinion of the Commissioner or of a federal court to assist this Court to discharge its functions.<sup>111</sup>

3.129 In *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (*State Bank* case), Gibbs CJ clearly identified the practical purposes of s 44.

The purpose of a remitter under s 44 is simply to relieve this court of the necessity to hear cases that might more conveniently be heard elsewhere, particularly where the litigation involves trial of issues of fact. The court should not, by making a remitter, alter the rights of the parties.<sup>112</sup>

108 M Pryles 'The remission of High Court actions to subordinate courts and the law governing torts' (1984) 10 *Sydney Law Review* 352, 358.

109 (1917) 15 WN (NSW) No 12 Cover Note (14 August 1917), as cited in Pryles, id.

110 (1969) 43 ALJR 452.

111 (1997) 73 IR 58, 59.

112 (1984) 154 CLR 579, 586–587.

3.130 The United States Courts have taken a broadly similar approach to Australia in the use of remittal powers, with perhaps the major difference being that United States courts have been more explicit in considering pragmatic factors such as the conservation of judicial resources and case management of appellate courts when exercising their powers.

3.131 According to Gummow J in *Re Jarman*,<sup>113</sup> the Supreme Court of the United States has developed a ‘comparable doctrine’ to the High Court’s remittal power in that the former can refuse leave to commence suits in its original jurisdiction under Article III of the United States Constitution. The Supreme Court may refuse leave if there is an alternative forum ‘where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had’ and to ensure ‘that our increasing duties with the appellate docket will not suffer’.<sup>114</sup> This doctrine has developed notwithstanding the time-honoured maxim of the Anglo-American common law tradition that a court possessed of jurisdiction generally must exercise it.<sup>115</sup> That maxim was articulated by Marshall CJ in *Cohens v Virginia* when he said that ‘we have no more right to decline the exercise of jurisdiction, than to usurp that which is not given’.<sup>116</sup> There are exceptions to this maxim, including the capacity of the Supreme Court to decline jurisdiction on the ground that it is an inappropriate forum, although this view has been subject to criticism.<sup>117</sup>

**Question 3.28.** The remitter power is one means of permitting the High Court to focus on its principal tasks of constitutional adjudication and the determination of important appellate matters. What use, if any, should be made of other mechanisms for discouraging inappropriate use of the Court’s original jurisdiction, such as refusing costs to a successful plaintiff or awarding costs on the lower scale of a state court that would have been competent to hear the action?

**Question 3.29.** In what circumstances should a matter be remitted? Should the section stipulate the factors that the High Court should consider in determining whether to remit a matter or retain it? Relevant factors might include: whether the case raises constitutional issues; whether there are conflicting decisions of intermediate appellate courts; the interests of justice; and the interests of the parties.

113 (1997) 188 CLR 595, 634

114 *ibid*, quoting *Illinois v City of Milwaukee* 406 US 91, 93–94 (1972).

115 *ibid*, quoting *Ohio v Wyandotte Chemicals Corp* 401 US 493, 496–497 (1971).

116 6 Wheat. 264, 404 (1821).

117 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 76.

**Question 3.30.** Should the Australian approach to remittal adopt or adapt the United States approach to permit explicit reference to factors such as the conservation of judicial resources and case management issues when exercising the discretion to remit?

## Interpreting the power

### *A broadly construed power*

3.132 Established case law provides that s 44 is to be ‘liberally construed’. Under s 44(1) the High Court can only remit an action to any federal court, state or territory court that has ‘jurisdiction with respect to the subject matter and the parties’. The meaning of the latter phrase was considered for the first time by the High Court in *Johnstone v Commonwealth*.<sup>118</sup> The plaintiff commenced an action in the High Court against the Commonwealth claiming damages for negligence. The alleged negligence occurred in South Australia and the plaintiff, who resided in New South Wales, applied for the action to be remitted to the Supreme Court of New South Wales. The issue before the High Court was whether the Court could remit the action to any Supreme Court of a state or only to the Supreme Court of the state in which the cause of action arose, namely South Australia.

3.133 The majority held that s 44 enabled the Court to remit an action in tort against the Commonwealth to the Supreme Court of any state. The section permitted remittal to a court that did not already have the requisite jurisdiction. Gibbs J, a member of the majority, gave the following reasons:

There is no reason to give s 44 a narrow, restrictive construction. If the parliament had intended that remitter should be made only to a court already invested with jurisdiction it would have been very easy to say so. Strong reasons of convenience may in a particular case demand that a matter pending in this court should be remitted to a Supreme Court other than that in which the cause of action arose. There may be claims in tort against the Commonwealth which did not arise in any State or Territory, eg claims that arose on the high seas or abroad; on the construction suggested by the Commonwealth, this Court would be constrained to hear such cases itself, there being no court already having jurisdiction to which they could be remitted. It would not serve any useful purpose to confine the words of s 44 in the manner suggested and to fetter a power of remitter, which was obviously intended to be large and general. The section does not compel a remitter to be made — it confers a discretion, to be exercised after due consideration of all the circumstances of the case — and it is not immaterial that the discretion which s 44 confers is entrusted to this Court which is the ultimate judicial authority of the Commonwealth: provisions granting such a discretion should be liberally construed.<sup>119</sup>

<sup>118</sup> (1979) 143 CLR 398.

<sup>119</sup> (1979) 143 CLR 398, 402. See also 407 (Murphy J), 408 (Aickin J).



3.134 The principle espoused by the majority in *Johnstone* has been followed in a series of cases.<sup>120</sup> In *Elders IXL Ltd v National Companies and Securities Commission*, Dawson J stated that:

It is not jurisdiction in the particular case that matters for the purposes of s 44. It is jurisdiction to entertain an action of the kind in question that is important and in applying the section it should be given a wide rather than a narrow construction.<sup>121</sup>

3.135 This broad application of the power was continued in the *State Bank* case<sup>122</sup> where the High Court held that s 44(2A) did not contain an exhaustive statement of the power to remit matters of the kind to which it refers. As a result, matters falling within s 44(2A) and s 44(2) can be remitted to the Federal Court or to state or territory courts.

3.136 In *Bowtell v Commonwealth*,<sup>123</sup> Toohey J adopted the reasoning in the *State Bank* case and held that if a matter pending in the High Court falls within s 44(1) and s 44(2A) then the matter can be remitted to a court other than the Federal Court.<sup>124</sup>

### ***Remittal and prerogative relief***

3.137 One of the few examples where the Court has refused to remit is *Re Jarman; Ex parte Cook*,<sup>125</sup> which was concerned with whether the High Court could remit an application for writs of certiorari and mandamus addressed to a judge of the Industrial Relations Court to that Court for determination. The refusal to remit was not based on any reading down of the remittal power. The majority held that the phrase ‘officer or officers of the Commonwealth holding office under this Act’ in s 412(2) of the *Industrial Relations Act 1988* (Cth) did not include a judge of the Industrial Relations Court. Accordingly, that Court had no jurisdiction with respect to the subject matter and consequently the High Court had no power to remit the matter under s 44(1).

3.138 One potential area of difficulty in the broad interpretation of s 44, touched upon in *Re Jarman*, is the omission from s 44(2) of a reference to s 38(e) JA. Section 38(e) concerns matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court. In the *State Bank* case, Gibbs CJ commented that the matters in s 38(e) were ‘obviously

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120 See eg *Weber v Aidone* (1981) 36 ALR 345; *Re Federal Commissioner of Taxation; Ex parte Bayford Wholesale Pty Ltd* (1983) 48 ALR 477; *Broken Hill Proprietary Co Ltd v National Companies and Securities Commission* (1986) 160 CLR 492.

121 (1986) 67 ALR 545, 548–549.

122 (1984) 154 CLR 579.

123 (1989) 86 ALR 31.

124 id, 33.

125 (1997) 188 CLR 595.

excluded' from the power of remitter 'as a matter of policy'.<sup>126</sup> However, the policy reasons for such exclusion were not made explicit in the parliamentary debates relating to the proposed amendments.<sup>127</sup>

3.139 Nor is it clear to what extent matters falling under s 38(e) are capable of being remitted by virtue of s 44(1) or s 44(2). As noted above, for s 44(1) to operate the receiving court must possess jurisdiction to entertain an action of the kind in question. While s 39B JA grants the Federal Court original jurisdiction in relation to matters 'in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth', s 39B(2) explicitly excludes some categories, namely, a person holding office under the *Workplace Relations Act 1996* (Cth) or the *Coal Industry Act 1946* (Cth) or a judge or judges of the Family Court of Australia. Such categories would seem to be excluded from the operation of s 44(1) for the purpose of remittal. One suggestion is that remittal to the Federal Court might still be possible for these categories under s 44(2A) on the basis that prohibition or mandamus is a matter in respect of which the Commonwealth, or a person sued on its behalf, is a party.<sup>128</sup>

3.140 An issue to consider is whether legislation should explicitly include or exclude s 38(e) matters from the categories of matters that are capable of being remitted. One possibility might be to consider whether a distinction should be made between federal court judges and other officers of the Commonwealth. While it may be appropriate, for example, for the Federal Court to consider prerogative writs in relation to most classes of Commonwealth officers, it would be problematic for it to do so in relation to judges of other federal courts. Moreover, it is not possible for a federal court to issue a prerogative writ against officers of that same court. In *Re Jarman* the majority of the High Court rejected the contention that s 412(2) and (3) of the *Industrial Relations Act 1988* (Cth) permitted the Industrial Relations Court to issue a writ of mandamus directed to a judge of that Court. Brennan CJ said

[i]t is ludicrous to contemplate a superior court having jurisdiction to determine in proceedings for mandamus or prohibition directed to itself whether its own decision as to jurisdiction is correct. ...

The writ of mandamus is a supervisory remedy, issuing to an officer subordinate to the jurisdiction of a superior court having jurisdiction to issue the writ, commanding the performance of a public duty that, in the opinion of the superior court, the officer has refused to perform. A Judge of the Industrial Relations Court is not an officer subordinate to the jurisdiction of that Court. Nor could that Court form an opinion that a Judge had wrongly failed to exercise its jurisdiction when the decision of that Judge had the effect of a Court decision that there was no jurisdiction to exercise.<sup>129</sup>

126 (1984) 154 CLR 579, 583.

127 *Hansard* (H of R) 3 April 1984, 1284–6; 5 April 1984, 1477–85, 1490–6; *Hansard* (Sen) 8 March 1984, 584–6; 29 March 1984, 852–65, 934–40; 2 April 1984, 1062–4.

128 LBC *The laws of Australia* Vol 19 Government '19.7 Practice & Procedure', para 40.

129 (1997) 188 CLR 595, 603–604.

***Remittal and appellate jurisdiction***

3.141 A further issue, which has not been the subject of judicial decision or comment, is whether the High Court could use its remittal power when exercising its appellate jurisdiction. Section 44 on its face would seem to suggest that the Court could do so. Section 44(1) refers to ‘any matter ... that is at any time pending in the High Court, whether originally commenced in the High Court or not’. However, constitutional considerations might arise where the High Court seeks to remit a matter falling within its appellate jurisdiction. That is because s 73 of the Constitution guarantees certain channels of appeal to the High Court, subject to ‘exceptions’ or ‘regulations’ made by Parliament. The question would then arise as to whether remitter was a permissible exception or regulation. In addition, if the High Court remitted an appeal to another court, for example the Federal Court, there might be argument as to whether s 73 of the Constitution enabled the High Court to then hear an appeal from the Federal Court’s decision.

3.142 Constitutional issues might also arise in particular types of appellate remitter, for example, if the Federal Court was authorised on remitter to hear an appeal from a state Supreme Court where the matter did not fall within sections 75 or 76 of the Constitution. The constitutional limitations on the appellate jurisdiction of federal courts (other than the High Court) is discussed in Chapter 4.

**Question 3.31.** Is there a need to reformulate s 44 to broaden the power of remittal? Does the High Court’s interpretation of s 44 in *Johnstone v Commonwealth* make it desirable to amend the section to clarify this issue, or does it make it unnecessary to do so?

**Question 3.32.** To which courts should the High Court be able to remit a matter? Should the section provide that the Court may remit to any court in Australia, or to any court that ‘has jurisdiction over the same kind of party and the same kind of subject matter’? What effect might any extension of the receiving court’s jurisdiction have on state courts?

**Question 3.33.** What power should the High Court have to remit applications for prerogative relief directed against officers of the Commonwealth or of a federal court? Should a distinction be made between these two categories?

**Question 3.34.** Should a power of remittal be available to the High Court when it exercises its appellate jurisdiction?

### Choosing the appropriate receiving court

3.143 In many instances, s 44 offers the High Court a range of possible courts to receive the remittal. In such cases, by what principles is the choice to be made? The jurisprudence of the High Court has distinguished between cases in which the laws of the competing jurisdictions are materially the same and those cases in which they differ.

#### *Cases where the laws of competing jurisdictions are materially the same*

3.144 In *Weber v Aidone*,<sup>130</sup> the High Court held that where there is no material difference in the laws of the states then, in choosing the receiving court, the balance of convenience is of central importance. Yet, as Toohey J commented in *Crouch v Commissioner for Railways (Qld)*, ‘the phrase “balance of convenience” is a somewhat elusive one, inviting a question at the outset as to whose convenience is to be taken into account’.<sup>131</sup>

3.145 The High Court has responded to that question to the effect that the power of remittal ‘is intended to facilitate the course of litigation rather than to enhance or diminish a plaintiff’s rights or correspondingly alter a defendant’s obligations’.<sup>132</sup> In *Crouch*, Toohey J concluded that where there was no material difference in the law applicable in the potential receiving courts, remittal should be determined by the balance of convenience test. In applying that test, the place where the cause of action arose is of some significance.

Of course the jurisdiction where this cause of action arose may prove to be the most convenient forum because that is where witnesses are likely to be found. Equally, if the scales are evenly poised, the close connection of the place where the cause of action arose will usually lead to remittal to that jurisdiction. This general approach is, I think, consistent with what was said in *Weber v Aidone* and in *Pozniak v Smith*.<sup>133</sup>

3.146 The High Court has tended to avoid an inflexible application of the balance of convenience test. For example, the Court has said that the balance of convenience ‘cannot be allowed to lead to injustice’.<sup>134</sup> As Toohey J stated in *Crouch*,

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130 (1981) 36 ALR 345.

131 (1989) 85 ALR 347, 349.

132 *Robinson v Shirley* (1982) 56 ALJR 237, 239; approved in *Pozniak v Smith* (1982) 151 CLR 38, 47; *State Bank of New South Wales v Commonwealth Savings Bank* (1984) 154 CLR 579, 586.

133 (1989) 85 ALR 347, 350.

134 *Pozniak v Smith* (1982) 151 CLR 38, 47.

Assessing the balance of convenience is not simply an exercise in costing; that would not be difficult to do. Equally it is not the convenience of the parties themselves with which the court is primarily concerned. The aim is, I think, to select the court, which in all the circumstances, will facilitate the course of the litigation.<sup>135</sup>

3.147 Relevant factors in facilitating the course of litigation include where the cause of action arose; the residence of the parties; the location, age, health and importance of witnesses; the speed at which a matter could be heard; travelling expenses and witness fees; the availability of legal aid; the personal and professional inconvenience to witnesses; the capacity of the parties to meet litigation expenses; and any injustice to the parties if compelled to litigate in a particular state.

***Cases where there is a material difference in the law of competing jurisdictions***

3.148 In *Pozniak v Smith*,<sup>136</sup> the High Court considered what principles should govern remittal of a tort action when the choice lies between the Supreme Courts of two states and there is a material difference in the laws of those states which would significantly affect the assessment of damages. Gibbs, Wilson and Brennan JJ stated:

We do not seek to minimize the relevance of the factor of convenience in a case where the applicable law in the competing jurisdictions is substantially similar. It is then of great importance. However, in our opinion, it cannot go beyond that, unless the circumstances are wholly exceptional. The balance of convenience cannot be allowed to lead to injustice. The only safe course, in a case where the relevant law in the competing jurisdictions is materially different in its effect on the rights of the parties, is to remit to the State whose law has given rise to the cause of action.<sup>137</sup>

3.149 In *Pozniak v Smith*, Mason J canvassed a number of different approaches: the balance of convenience; the plaintiff's right to choose the place where the action is brought; the law of the place where the tort is committed;<sup>138</sup> the state whose law has the most significant relationship with the occurrence and the parties; and the court which ordinarily would have exercised jurisdiction in the case but for the circumstance that the plaintiff commenced action in the High Court. His Honour concluded that:

It would be a mistake to say that in every case now under consideration we should apply an inflexible approach. We should preserve the width of the discretion, the object of which is to do justice between the parties. That will be done if, generally speaking, we select in personal injury cases, if not in all tort cases, the courts of the State where the injury occurred, so that the law of that State, the *lex loci delicti*, will determine the rights and liabilities of the parties, unless, with respect to the particular

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135 (1989) 85 ALR 347, 351.

136 (1982) 151 CLR 38.

137 *id.*, 47.

138 *Lex loci delicti*.

issue, some other State has a more significant relationship with the occurrence and the parties, in which event the case will be remitted to that State and its law will be applied.<sup>139</sup>

3.150 The decision in *Pozniak* has been applied by the High Court in *Fielding v Doran*<sup>140</sup> and *Mcauley v Hamilton Island Enterprises Pty Ltd*.<sup>141</sup>

3.151 The High Court's recent decision in *John Pfeiffer Pty Ltd v Rogerson*<sup>142</sup> is likely to have an impact on remittal cases where there is a material difference in law of the competing jurisdictions. The Court in that case affirmed the view that there is a single common law in Australia and that any relevant difference in substantive law will stem from statute.<sup>143</sup> This reasoning may mean that differences in law in relation to remitter will become less significant and that arguments as to the balance of convenience will predominate.

**Question 3.35.** Should the discretion to remit be structured so as to provide criteria for determining the appropriate receiving court? Should the criteria distinguish between cases in which the law to be applied is materially the same and those in which it is not?

### The High Court's power to issue directions

3.152 In *Pozniak* the High Court held that the proviso in s 44(3)(b) JA, that remittal is 'subject to any directions of the High Court', is limited to matters of procedure and does not extend to substantive law.

The phrase 'subject to any directions of the High Court' controls the statement which immediately follows it, namely, 'further proceedings in the matter shall be as directed by the court to which it is remitted'. Clearly, in our opinion, the power to give directions is confined to matters of procedure. The substantive rights of the parties will be determined by the law of the forum.<sup>144</sup>

3.153 Mason J agreed, stating

[i]t is apparent that the clause empowers this court to give direction as to pre-trial and trial procedures. It does not arm this court with a power to instruct the Supreme Court of a State that it shall ignore the law of that State and apply instead the law of another State.<sup>145</sup>

139 (1982) 151 CLR 38, 54.

140 (1985) 60 ALR 342.

141 (1986) 69 ALR 270.

142 (2000) 172 ALR 625.

143 id, 648.

144 (1982) 151 CLR 38, 44.

145 id, 55.

3.154 In *Bowtell v Commonwealth*,<sup>146</sup> Toohey J commented that in some cases it would be appropriate for the High Court ‘to retain general control over a matter that is remitted’ but that ‘those circumstances will be unusual’. An example of an unusual situation arose in *Mabo v Queensland*,<sup>147</sup> where Gibbs CJ gave the parties liberty to apply to the High Court for any directions that might prove to be necessary when the matter was heard in the Supreme Court of Queensland. Mansfield J of the Federal Court has held that once the Federal Court has jurisdiction to entertain a matter that is remitted to it by the High Court, it may apply its own procedural rules to the matter.<sup>148</sup>

3.155 In *Dinnison v Commonwealth*,<sup>149</sup> Foster J of the Federal Court held that the Court had power under the cross-vesting legislation to transfer to a Supreme Court of a state a matter remitted to the Federal Court by the High Court. In his Honour’s view, the words ‘subject to any directions of the High Court’ in s 44(3)(b) relate

only to the power of the High Court to give directions as to matters of procedure in conjunction with and in aid of the order for remitter. They do not empower the High Court to consider any applications for directions in respect of the remitted matter once the remittal has taken effect. After that point is reached all relevant directions fall within the jurisdiction of this Court.<sup>150</sup>

**Question 3.36.** Is there a need to clarify the High Court’s power to give directions in relation to the remittal? Should the power be expressly limited to procedural matters or should it extend to substantive matters? Are the directions limited to matters pertaining to the process of remission or should they extend to the future conduct of the proceedings by the receiving court?

### The impact of cross-vesting

3.156 The cross-vesting scheme is described in paragraphs 3.238–3.253. In 1987 Cook suggested that the cross-vesting legislation would be likely to curtail the practice of litigants commencing diversity suits in the High Court because litigants could seek a transfer to the court of their choice pursuant to the transfer provisions in s 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).<sup>151</sup> Thus, litigants would no longer need to commence proceedings in the High Court’s original jurisdiction and then seek to have the matter remitted to a court of their

146 (1989) 86 ALR 31.

147 (1986) 64 ALR 1.

148 *Cam Mui Chi v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 14.

149 (1997) 74 FCR 184.

150 (1997) 74 FCR 184, 189.

151 C Cook ‘Section 79 *Judiciary Act 1903* — how widely does it travel?’ (1987) 17 *Federal Law Review* 199, 199.

choice since the cross-vesting scheme allows ready transfer between courts. In fact there have been few reported cases concerning remittal of diversity cases since the cross-vesting legislation was introduced.<sup>152</sup> Cases concerning remittal since then have mainly arisen in relation to matters involving the Commonwealth.<sup>153</sup>

3.157 In *Re Wakim; Ex parte McNally*,<sup>154</sup> the High Court held that the cross-vesting legislation was constitutionally invalid in so far as it purported to invest the Federal Court with state judicial power. However, other aspects of the scheme, including the transfer provisions, remain valid. The Commission seeks comment on the likely impact of *Re Wakim* on the use of the High Court's original jurisdiction in matters arising under s 75 of the Constitution and on the consequences of this for the exercise of the Court's powers of remittal.

**Question 3.37.** What impact, if any, has the cross-vesting scheme had on the need for the High Court to use its remittal power? To what extent, if any, is *Re Wakim; Ex parte McNally* likely to affect this situation?

### Remittal after removal

3.158 Section 42 JA permits remittal after a matter has been removed into the High Court from another court pursuant to s 40. Removal is discussed in paragraphs 3.161–3.191. Section 42 allows the High Court to remit all or part of a cause to the court from which it was removed, at any stage of the proceedings, with such directions as the High Court thinks fit. Under s 42(2), where it appears to the High Court that it does not have original jurisdiction in relation to a cause removed into it, the Court shall remit the cause to the court from which it was removed.<sup>155</sup>

3.159 An issue arising in the present context is whether s 42 should be broadened to allow the High Court to remit a removed matter to a court other than that from which it came. In some circumstances there may be a more appropriate court than the original court. Section 42 could be amended to allow remittal to any federal, state or territory court that has jurisdiction with respect to the subject matter and the parties.

152 See *Gardner v Wallace* (1995) 184 CLR 95; *Crouch v Commissioner of Railways (Qld)* (1989) 85 ALR 347.

153 For example *Utemorrah v Commonwealth* (1992) 108 ALR 225.

154 (1999) 198 CLR 511.

155 *Attorney General (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315.



**Question 3.38.** Should s 42 of the *Judiciary Act* be amended to broaden the power of remittal after removal so that remittal is allowed to any federal court or state or territory court that has jurisdiction with respect to the subject matter and the parties?

### Practice and procedure

3.160 Under current High Court Rules, remittal is sought by way of summons supported by an affidavit that sets out the background of the proceedings and the reasons why the High Court should remit the matter.<sup>156</sup> The summons is made to a justice in chambers.<sup>157</sup> If the parties consent, remittal may be ordered upon that written consent being filed with the Court.<sup>158</sup>

**Question 3.39.** Are any changes needed to the practice and procedure of remittal by the High Court?

### Transfers between courts: removal from a lower court to a higher court

3.161 Since 1903, s 40 JA has authorised the High Court to make an order removing into the High Court any cause ‘arising under the Constitution or involving its interpretation’ which is pending in another court. This permits removal in the class of matters specified in s 76(i) of the Constitution, reinforcing the role of the High Court as the final arbiter of the Constitution. In 1976 a second ground for removal was added, allowing the High Court in non-constitutional cases to remove any cause pending in a federal court or to remove any cause pending in a state Court involving the exercise of federal jurisdiction.<sup>159</sup>

3.162 The removal procedure is designed to allow the High Court to resolve constitutional issues and, since 1976, other significant federal cases without the delays and expense of requiring the cases to proceed to final judgment and then through the usual appellate process. Mason CJ commented in *O’Toole v Charles David Pty Ltd*:

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<sup>156</sup> LBC *The laws of Australia* Vol 19 Government ‘19.7 Practice & Procedure’, para 42.

<sup>157</sup> O 51 HCR.

<sup>158</sup> O 44 r 23 HCR.

<sup>159</sup> *Judiciary Amendment Act 1976* (Cth) s 9.

[t]he procedure for removal into this court under s 40 of the *Judiciary Act 1903* (Cth), which is designed to ensure that constitutional questions and other questions of public importance are determined by this court, enables it to consider preliminary questions of law decided by the Full Court of the Federal Court, even though the decision of that court is not the subject of an appeal and may not be appealable.<sup>160</sup>

3.163 The removal of constitutional and non-constitutional causes have common elements but with some important differences. The next section of the paper describes each type of removal and the following section discusses the common elements and the key differences. There have been comparatively few applications for removal under s 40. The High Court *Annual reports* provide some data. For example, there were five applications in 1998–99 and three in 1999–2000.<sup>161</sup> The data does not provide a breakdown between those cases raising constitutional issues and those raising non-constitutional issues.

### Removal of constitutional cases

3.164 Section 40(1) provides for the removal into the High Court of ‘any cause or part of a cause arising under the Constitution or involving its interpretation’ pending in a federal, state or territory court at any stage of the proceeding before judgment.

3.165 The order for removal may be made upon the application of a party where ‘sufficient cause’ is shown. However, an order will be made ‘as of course’ where the Commonwealth Attorney-General or a state or territory Attorney-General makes an application.

3.166 Originally, removal was restricted to causes involving constitutional issues in ‘any Court of a State’. Application for removal could be made by parties showing ‘sufficient cause’, or by the Commonwealth or state Attorneys-General as a matter ‘of course’. Since then the power has been broadened to permit removal of causes from federal, state or territory courts.<sup>162</sup> In 1983 the Attorney-General of the Northern Territory was added as a potential applicant,<sup>163</sup> as was the ACT Attorney-General in 1992.<sup>164</sup>

3.167 For many years s 40A provided that it was the duty of a court to proceed no further and to order the removal of a cause to the High Court where the cause gave rise to any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state or states. This section was added in 1907 but repealed in 1976<sup>165</sup> with the practical consequence of enabling more constitutional matters to be adjudicated in state courts.

160 (1991) 171 CLR 232, 247.

161 High Court of Australia *Annual report 1999–2000*, 66.

162 *Judiciary Amendment Act 1976* (Cth) s 9.

163 *Statute Law Miscellaneous Provisions Act (No 2) 1983* (Cth) Sch 1.

164 *Law and Justice Legislation Amendment Act (No 3) 1992* (Cth) Sch.

165 *Judiciary Act 1907* (Cth) s 5; *Judiciary Amendment Act 1976* (Cth) s 9.

## Removal of non-constitutional cases

3.168 Section 40(2) allows the removal of non-constitutional causes pending in a federal court (other than the High Court) or territory court, or in a state court exercising federal jurisdiction. Section 40(4) provides that the High Court shall not make an order under s 40(2) unless all parties consent to the making of the order or the Court ‘is satisfied that it is appropriate to make the order having regard to all the circumstances, including the interests of the parties and the public interest’.

## What is a ‘cause’?

3.169 The power in relation to both constitutional and non-constitutional cases refers to the removal of a cause or part of a cause. ‘Cause’ is defined in s 3 to include ‘any suit, and also includes criminal proceedings’. In *Re An Application by Public Service Association of NSW*, Williams J adopted the view that ‘cause’ should be given a wide, non-technical meaning and includes ‘any proceedings competently brought before and litigated in a court’.<sup>166</sup> Consistently with a broad approach to the term, in *Ex Parte Walsh and Johnson; In Re Yates*<sup>167</sup> the High Court held that a rule nisi for habeas corpus was a ‘cause’ within s 40.

3.170 Section 3 defines ‘suit’ as including ‘any action or original proceedings between parties’. The section defines ‘matter’ as including ‘any proceeding in a Court, whether between parties or not, and also any incidental proceeding in a cause or matter’. ‘Proceeding’ is not defined. While the remittal power in s 44 refers to ‘matters’, the removal power refers to ‘causes’. The Commission invites comment on the use of the terms ‘cause’, ‘matter’, ‘suit’, ‘action’ and ‘proceeding’ in the *Judiciary Act*, including whether they are used consistently and whether it is possible or desirable to limit the range of terms used. For example, ‘matter’ or ‘proceeding’ might be preferable to ‘cause’ or ‘suit’ on the basis that they are more commonly used.

## When is a cause pending?

3.171 In relation to both constitutional and non-constitutional causes, removal is only permitted where a cause is pending. Pending proceedings include pending appeals.<sup>168</sup> However, cases where final orders have been made in the lower court (or the intermediate appellate court in the case of appeals) cannot be removed because there are no pending proceedings. Such cases must progress through the usual appellate process until they can be removed from an intermediate appellate court. It is possible to remove a cause where minutes of orders have been published

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<sup>166</sup> (1947) 75 CLR 430, 433–34.

<sup>167</sup> (1925) 37 CLR 36.

<sup>168</sup> *Registrar, Accident Compensation Tribunal v Commissioner of Taxation (Cth)* (1993) 178 CLR 145.

by the lower court but not yet entered.<sup>169</sup> The usual practice is that the High Court will not order removal until any antecedent non-constitutional questions are determined by the lower court.<sup>170</sup> However, if a constitutional issue is raised and an Attorney-General seeks removal, the Court must order removal (s 40(1)).

### Who may seek removal of a cause?

3.172 Applications for removal for a constitutional case may be made by a party or an Attorney-General at any stage of the proceedings before final judgment. For an application by a party to succeed, the party must show ‘sufficient cause’. However, the High Court as a matter ‘of course’ must remove on the application of an Attorney-General.

3.173 The application for removal of a non-constitutional case may be made by a party or by the Commonwealth Attorney-General at any stage of the proceedings before final judgment. Unlike the power in relation to constitutional issues, an order for removal under s 40(2) on the application of the Attorney-General is not made ‘as of course’. Removal is not permitted by a third party to the application for removal — the process must be instituted by the party named in it as the applicant.<sup>171</sup>

3.174 One issue for consideration is whether courts other than the High Court, for example intermediate appellate courts, should have the power of removal, particularly in relation to cases that may warrant removal on the grounds of the public interest or the administration of justice. Providing other courts with a power of removal in constitutional cases might be more problematic because the High Court is seen as the final arbiter of any significant constitutional issue.

3.175 There is currently no power in the High Court to remove a matter of its own motion in relation to either constitutional or non-constitutional cases. It is left to the parties or to Attorneys-General to make application in particular circumstances. One view is that the Court, as the final arbiter of the Constitution, should be able of its own motion to order removal of a matter that raises significant constitutional issues. On the other hand, such a power might be criticised in that it removes the rights of the parties to determine the forum of their choice, takes the matter outside the normal processes of appeal, and deprives the High Court of the benefit of a lower court’s reasoned decision. While it might be accepted that Attorneys-General, as the first law officers of their respective jurisdictions, should be able to apply for removal, it might be seen as overtly activist to allow the High Court to make orders removing cases to itself.

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169 *O’Toole v Charles David Pty Ltd* (1990) 96 ALR 1.

170 *Richmond v Edelsten* (1986) 67 ALR 484.

171 See *McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation* (2000) 171 ALR 335 (Gummow J).

3.176 Under s 40(1) there is mandatory removal on the application of an Attorney-General whereas, if the applicant is a party to the proceedings, the court has a discretion to remove. It could be argued that the court should have a discretion for all applications for removal, including those made by an Attorney-General, on the basis that it should be for the High Court to determine its own workload and the significance of particular matters. Such discretion could be exercised by a single justice or Full Court, as with special leave applications (see s 21(1) JA). An alternative view is that Attorneys-General should play a primary role in choosing constitutional cases that are of legal or public significance. On this view, removal to the High Court is justified and should be carried out without the delay that might ensue if the Court had to exercise a discretion. There is no evidence before the Commission that Attorneys-General make inappropriate applications for removal although the Commission welcomes submissions on that issue.

### **When does a cause raise a constitutional issue?**

3.177 Section 40 uses the criterion of ‘arising under the Constitution or involving its interpretation’. That phrase has been interpreted by the High Court to mean that the question arises as soon as it appears that the case can be resolved by deciding that question. This is so even if it might ultimately prove possible, by answering other questions, to dispose of the case without determining the constitutional issue.<sup>172</sup>

3.178 The Court’s earlier approach to this phrase was quite different. In *James v South*, the Court suggested that the test was whether the matter presents ‘necessarily and directly and not incidentally an issue upon its interpretation’.<sup>173</sup> In *Hopper v Egg and Egg Pulp Marketing Board*, the Court focused on whether the cause ‘really and substantially involves the interpretation of the Constitution’, was ‘a real question involving the interpretation of the Constitution’ and was ‘genuinely raised’.<sup>174</sup>

3.179 One approach to interpreting the phrase as it is used in s 40 is to refer to the interpretation of the same phrase in s 76 of the Constitution. Section 76(i) provides that the Parliament may make laws conferring original jurisdiction on the High Court ‘in any matter arising under this Constitution, or involving its interpretation’. That expression has been the subject of considerable judicial attention. Part of the complexity has involved distinguishing s 76(i) from s 76(ii), which enables Parliament to confer jurisdiction on the High Court ‘in any matter arising under any laws made by the Parliament’. The High Court at times has emphasised that s 76(ii), unlike s 76(i), does not include the words ‘or involving its

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172 *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315, 326–327.

173 (1927) 40 CLR 1, 40; also see *Hogan v Ochiltree* (1910) 10 CLR 535; *Ex Parte Walsh and Johnson; In Re Yates* (1925) 37 CLR 36, 72–78 (Isaac J).

174 (1939) 61 CLR 665.

interpretation'.<sup>175</sup> The Court has also drawn a somewhat fine distinction between 'arising under' and 'involving its interpretation'.<sup>176</sup>

3.180 The High Court has commented that 'the necessity of clearly identifying at an early stage of proceedings the existence of federal jurisdiction is a powerful reason for adopting the same broad approach to s 76(i) [of the Constitution] and s 40(1) matters'.<sup>177</sup>

3.181 Section 40(1) requires a party other than an Attorney-General to show 'sufficient cause' in an application for an order for removal. The High Court has not identified any systematic criteria for establishing 'sufficient cause' and much will turn on the particular circumstances of the case, including the significance and strength of the constitutional issue.<sup>178</sup>

### Grounds for removal of non-constitutional cases

3.182 The High Court cannot make an order for removal of non-constitutional cases unless all the parties consent or the Court is satisfied that it is appropriate to make the order having regard to all the circumstances, including the interests of the parties and the 'public interest' (s 40(4)).

3.183 The term 'public interest' is not defined in the *Judiciary Act*. The phrase has no precise meaning but might include factors such as fairness, transparency and impartiality in decision making, and reducing costs and delays in the administration of justice. In exercising its discretion to order removal, the Court may consider factors such as the nature and importance of the issue, whether it is appropriate to remove the matter at that stage, and the possible disadvantages of removal. These might include the High Court being denied the benefit of the lower court's judgment and the difficulty of deciding the matter where the lower court has not found the relevant facts.

3.184 Subject to the Constitution, s 40(3) confers jurisdiction on the High Court to hear and determine such causes or parts of causes, to the extent that the requisite jurisdiction is not otherwise conferred on the Court. This section identifies an important limitation on the High Court's ability to remove non-constitutional cases,

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175 L Zines 'Federal, associated, and accrued jurisdiction' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 281; see also *Felton v Mulligan* (1971) 124 CLR 367, 374 (Barwick CJ); *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 540; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ).

176 L Zines 'Federal, associated, and accrued jurisdiction' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 282; *Felton v Mulligan* (1971) 124 CLR 367; *LNC Industries Ltd v BMW (Aust) Ltd* (1983) 151 CLR 575.

177 *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315, 326–327. See also *Re an Application by the Public Service Association of New South Wales* (1947) 75 CLR 430, 433 (Williams J).

178 *Re Robertson* (1988) 79 ALR 577.

namely, that being an exercise of original jurisdiction, the subject matter of the cause must fall within one of the heads of jurisdiction enumerated in sections 75 or 76 of the Constitution. Section 40(3) seeks to confer on the High Court for the purpose of removal such jurisdiction in s 76 matters as the High Court does not already possess.

**Question 3.40.** Which courts should have the power to remove a cause from a court lower in the judicial hierarchy? Should it only be the High Court (as at present) or should the power be extended to other courts (for example, intermediate appellate courts)?

**Question 3.41.** What class of matters should be capable of removal — constitutional matters or any other matter? Should the class of matters capable of removal differ according to the court exercising the power (if the power is extended beyond the High Court)?

**Question 3.42.** At whose instance should a cause be able to be removed — any party to the action, all parties by consent, an Attorney-General, the court from which the cause is to be removed, or the court into which the cause is to be removed?

**Question 3.43.** Should removal be mandatory or discretionary? Should a different approach be taken according to different classes of case (for example, should applications for removal made by an Attorney-General be mandatory)?

**Question 3.44.** Should criteria be specified for removal of a cause? If so, what should they be — ‘sufficient cause shown’ (s 40(1)), ‘the interests of the parties’, ‘the public interest’ (s 40(4))? Should legislation include non-exhaustive criteria to assist in the interpretation of such terms?

**Question 3.45.** Is the term ‘cause or part of a cause’ a satisfactory description of a proceeding which is apt for removal? How does this term relate to others such as ‘matter’, ‘proceeding’ and ‘suit’? Which is the preferable term for the removal power?

### **Powers of the High Court after removal**

3.185 Under s 40 the High Court may order removal on such terms as the Court thinks fit. Once a cause is removed, whether it is a constitutional or non-constitutional case, the High Court exercises control over the conduct of the proceedings. Section 41 provides that when a cause or part of a cause is removed

into the High Court under s 40 further proceedings in that cause or part of a cause shall be as directed by the High Court. Originally, s 41 stated that where proceedings had been removed to the High Court those proceedings were to be conducted in accordance with High Court procedure as if the cause had been originally commenced in the High Court. An exception was made where the trial of a person for an indictable offence was removed to the High Court. In that circumstance, the procedure and law of the court and state from which it was removed was to be applied.<sup>179</sup>

3.186 In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*,<sup>180</sup> Mason CJ refused to include an additional question in a stated case on the basis that the order for removal made by the High Court at an earlier date had not included the additional question. In the case before Mason CJ, the only question was whether the draft stated case in respect of a taxation assessment should be amended to add a supplementary question to the question of law that was then proposed in the draft. Mason CJ said the additional question could not be added because of the form of order for removal made by the High Court. This case suggests that the Court will not readily depart from the terms of any order for removal.

3.187 The High Court is not bound by the decisions, reasoning or proceedings of the lower courts from which a matter is removed. In *O'Toole v Charles David Pty Ltd*,<sup>181</sup> the High Court held that in removing an entire proceeding from the Federal Court, the High Court was not bound by the answers given by the Full Court of the Federal Court in response to a case stated by a single Federal Court judge. The basis of the High Court's reasoning was that the High Court could not 'be bound by a decision of a lower court in the hierarchy'.<sup>182</sup> Mason CJ said:

The procedure for removal into this court under s 40 of the Judiciary Act 1903 (Cth), which is designed to ensure that constitutional questions and other questions of public importance are determined by this court, enables it to consider preliminary questions of law decided by the Full Court of the Federal Court, even though the decision of that court is not the subject of an appeal and may not be appealable. Indeed it verges on the ludicrous to suggest that the very purpose of removal may be frustrated simply because the cause removed has proceeded to the point at which an unappealable order has been made. It is no answer to this argument to say that an appeal will lie when the court below makes a determination resolving the rights in suit. That may take a long time and involve great expense. The object of s 40 was to secure early resolution of constitutional questions and other issues of public importance.<sup>183</sup>

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179 *Judiciary Act 1907* (Cth) s 6.

180 (1994) 68 ALJR 303, 303.

181 (1990) 96 ALR 1.

182 *id.*, 7; see also *Fisher v Fisher* (1986) 161 CLR 438.

183 *id.*, 7 (Mason CJ).



3.188 Under s 45 when a cause or part of a cause is removed into the High Court the defendant may use any defence that might have been used if the cause had been commenced in the High Court. That is so notwithstanding that the court from which the cause was removed did not have jurisdiction to entertain the defence or could not entertain it in the same cause.

3.189 The only exception to the High Court's control over proceedings removed into it is provided by s 43.<sup>184</sup> Section 43 concerns the continuance of certain orders and proceedings extant in the lower court in matters removed into the High Court. The section provides that where a cause or part of a cause is removed, the following remain in force: orders relating to the custody or preservation of property that is the subject matter of the cause; any attachment and sequestration of goods or estate; all undertakings or security given; and all injunctions, orders and proceedings granted, made or taken. Section 40(5) allows for the transmission of records and documents between the High Court and the court from which the cause has been removed.

**Question 3.46.** What substantive or procedural law should be applied in matters removed into the High Court? In particular, should a defendant be able to set up any defence that would have been available had the proceedings been commenced in the High Court?

### Practice and procedure

3.190 Applications for removal are by way of notice of motion accompanied by an affidavit describing the background of the proceedings and identifying the relevant constitutional questions.<sup>185</sup> The affidavit in the case of applicant parties should also give reasons why the Court should make the order for removal.<sup>186</sup>

3.191 When a matter is removed there are a number of procedures to place the matter before the Full Court of the High Court. The parties may agree on a case stated or request that a question or questions be reserved under s 18 JA or O 35 HCR (see paragraphs 3.47–3.65).

**Question 3.47.** Are any changes needed to the practice and procedure relating to the removal of cases into the High Court?

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184 *Judiciary Amendment Act 1976* (Cth) s 9.

185 O 51 HCR.

186 O 51 HCR.

## Notice and intervention in constitutional cases

### Section 78B notices

3.192 Section 78B notices are one means of providing information about cases that may need to be removed into the High Court. Section 78B imposes a duty on every court (including the High Court) not to proceed in a cause involving a matter arising under the Constitution or involving its interpretation unless and until the court is satisfied that notice of the cause has been given to each of the Attorneys-General and a reasonable time has elapsed since such notice.

3.193 Section 78B notices may even be required where state legislative competence is at issue if the interpretation of the Constitution arises even indirectly. In *Boath v Wyvill*,<sup>187</sup> the Full Court of the Federal Court held that a s 78B notice was required in a case where the powers of the Parliament of Western Australia had to be construed in the context of sections 106 and 107 of the Constitution.

3.194 Section 78B was introduced in 1976, substantially in its present form.<sup>188</sup> The purpose of the section is to provide Attorneys-General with the opportunity to intervene in proceedings or to apply to the High Court to remove proceedings under s 40.

3.195 A court has no general discretion as to whether it will suspend proceedings once a constitutional issue is raised. However, s 78B(5) provides that a court may proceed without delay to hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary to do so in the interests of justice.

3.196 Under s 78B(4) the Commonwealth Attorney-General may authorise the Commonwealth to pay an amount for costs to a party where a matter is adjourned because of a s 78B notice.

3.197 Order 73 HCR provides that the party whose case raises a matter arising under the Constitution or involving its interpretation shall file a notice of a constitutional matter in the registry at Canberra. The notice must state specifically the nature of the matter and the facts showing that the matter is one to which s 78B applies. The party must serve a copy of the notice on every other party and on the Attorneys-General of the Commonwealth, the states, the Northern Territory and the ACT. Some courts have specified written forms for the giving of s 78B notices to

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187 (1989) 85 ALR 621, 634. Compare *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648, 654, (Rogers CJ (Com Div)).

188 *Judiciary Amendment Act 1976* (Cth) s 17.

Attorneys-General, including the Federal Court<sup>189</sup> and the Supreme Court of the Northern Territory.<sup>190</sup>

3.198 The New South Wales Court of Appeal has held that s 78B notices should, in addition to notifying the cause (that is the ‘subject matter for determination in a legal proceeding’), also specifically identify the constitutional issue to be raised as ‘would give reasonable notice to the Attorneys-General so they can elect whether or not to intervene or to seek removal’.<sup>191</sup> Priestley JA commented that the Court ‘should not take any risk of being in breach of the command of s 78B which says that it “is the duty of the court not to proceed in the cause unless and until [it] is satisfied that notice of the cause, specifying the nature of the matter” is given’.<sup>192</sup>

### *The duty of courts to require notices*

3.199 In *ACCC v CG Berbatis Pty Ltd*,<sup>193</sup> French J of the Federal Court held that the duty of a court under s 78B was to require that s 78B notices be given, even though the parties had not raised the constitutional issues. It is sufficient to activate the duty if the Court perceives a ‘live’ constitutional issue. As Burchett J explained in *Narain v Parnell*:

Section 78B only operates when the circumstances it postulates are made to appear to the court: it does not operate simply because a party asserts those circumstances. It is clear, from the reference to the possibility of intervention or removal of the cause to the High Court upon the initiative of an Attorney-General, that what the section contemplates is a constitutional question that is a live issue in the proceedings.<sup>194</sup>

3.200 In *ACCC v CG Berbatis Pty Ltd*, French J noted that counsel were unable to refer to any case in which a court itself had raised the constitutional issue that gave effect to s 78B. His Honour said that

[o]n the face of the section however its operation is not conditioned upon the constitutional point being raised by one of the parties. It is the character of the cause before the Court that determines whether the operation of the section is attracted.<sup>195</sup>

3.201 His Honour added

[t]hat is not to say that the Court should be astute to excavate constitutional questions out of the causes before it. But where, as in this case, it appears that there is a real and substantial constitutional issue, the Court’s duty is plain. For where there is such a

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189 O 51 r 1 FCR.

190 O 19.02.

191 *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 4 NSWLR 549, 555-559 (Kirby P).

192 id, 560-561.

193 (1999) 95 FCR 292.

194 (1986) 9 FCR 479, 486-489.

195 (1999) 95 FCR 292, 298.

question it goes to the authority of the Court to continue with the proceeding and so has something of the character of a jurisdictional issue. In this particular case there is the additional and practical concern that the constitutional question affects the statutory basis for the application. Were the applicant to succeed in its case at first instance, without the point being addressed, there is the possibility that it might thereafter be raised on appeal. Quite independently of s 78B the constitutional question is a threshold issue and cannot be avoided.<sup>196</sup>

3.202 French J also suggested that

in future the possibility of s 78B applying to a case should routinely be checked by solicitors and counsel for the parties and, in a case where there is any doubt, should be raised in a directions hearing or case management conference.<sup>197</sup>

3.203 French J also suggested that the provisions of s 78B might merit further review by the legislature. In his Honour's view, the court's discretion could be broadened to enable it

to proceed with a cause to which the section applies provided that reasonable notice is given to Attorneys-General. This would allow the Attorneys to intervene at some time before the conclusion of the proceedings that could be adjourned part heard for that purpose or to allow submissions by an intervening Attorney-General after the evidence and before judgment.<sup>198</sup>

### *Issues*

3.204 A number of concerns have been expressed about the operation of s 78B notices. The argument is not that the s 78B notice system should be abolished but that the procedures involved should be re-examined. The notices appear to fulfil a valuable role in providing notice about constitutional issues. However, there is a perception that many cases involving s 78B notices are not concerned with significant constitutional issues and such cases are often resolved without any consideration of the suggested constitutional issues. Many s 78B cases originate in magistrates courts and other lower courts and could be dealt with by the appellate process if necessary. The problem is exacerbated by the false perception that all s 78B notices must be responded to by each Attorney-General and this can result in wasted effort and resources if cases lack merit in constitutional terms. It can also delay the resolution of such matters.

3.205 In *Capelvine v Omegas Developments Corporation Pty Ltd*, Fitzgerald J encapsulated a number of the concerns expressed about s 78B.

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196 id, 300.

197 id, 301.

198 ibid.

It creates an impediment to the orderly disposition of the business of the Courts that is disproportionate to any benefit it provides ... Often such matters are raised, but, if the litigation could be concluded, would not have to be decided. Further, often such matters are raised which are patently without substance. Many jurisdictional questions afford good examples. Even if the High Court has recently decided the precise point in indistinguishable circumstances, a party can raise it again and halt proceedings. It is impractical to require that proceedings always be stopped whenever such a matter is raised to enable the Attorneys-General to consider whether they wish to become involved or to have the proceedings removed to the High Court, which is already overburdened. When an action has to be stopped it causes great inconvenience to the Court, the parties, their witnesses and indeed other litigants whose cases could have been set down for hearing during the days wasted because allotted to the matter which cannot go forward. Further, the already burdensome cost of litigation is increased, and judicial resources are used inefficiently, at a considerable cost to the public purse. It would not require an excess of confidence in the judges of the superior courts to permit them a discretion as to when notice should be given to the Attorneys-General.<sup>199</sup>

3.206 A particular concern with the issuing of s 78B notices arises in cases where urgent interlocutory relief is sought. Such relief could be delayed by the issuing of a notice, to the great detriment of a party. It should also be noted that s 78B applies to proceedings in the Full Court of the High Court so that while a matter is in the course of a hearing it may have to be stopped to allow notices to be issued to each Attorney-General. In most circumstances it could be expected that Attorneys-General would already be aware of any proceedings in the Full Court of the High Court involving significant constitutional issues.

3.207 The courts have attempted to guard against unmeritorious attempts to use s 78B particularly where a challenge is made on a point that has recently been decided by the High Court. The Full Court of the Family Court in *Re the Marriage of Smith* held that s 78B did not apply to a constitutional challenge that was based upon an issue recently determined by the High Court.<sup>200</sup> In *Green v Jones* Hunt J commented in response to a s 78B notice that concerned a challenge to a recent High Court decision

Although, in a strictly technical sense, such a challenge may be said to be a matter arising under the Constitution, I cannot imagine that s 78B was intended to permit never-ending challenges to matters which have already been determined by the High Court, particularly recently by that Court.<sup>201</sup>

3.208 In *ACCC v CG Berbatis Pty Ltd*, French J noted that if the asserted constitutional point is frivolous, vexatious or raised as an abuse of process, 'it will not attach to the matter in which it is raised the character of a matter arising under the Constitution or involving its interpretation'.<sup>202</sup>

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199 (1983) 5 ATPR ¶ 44, 536, 44, 546.

200 (1980) 6 Fam LR 245, 266 (Watson J).

201 (1979) 2 NSWLR 812, 818.

202 (1999) 95 FCR 292.

3.209 The Australian Government Solicitor has assisted the Commission by providing data about the numbers of s 78B notices issued for the 1999 calendar year. The data was provided on the basis that it is approximate only and is intended to provide a general guide as to the use of the provision. In 1999 there were 312 78B notices received by the Commonwealth Attorney-General, with 85 relating to proceedings in an inferior court and 26 raising a s 109 constitutional issue only. Seventy notices raised issues concerning arguments as to sovereignty and constitutionality in various forms, often in relation to taxation matters.<sup>203</sup>

3.210 There are a number of possible reforms to consider.

- ?? Exclude notices in relation to certain classes of constitutional matters. One possible candidate for exclusion is s 109 of the Constitution, which often requires the application of settled constitutional principles to new facts. Cases involving alleged inconsistency between Commonwealth and state law seldom raise significant constitutional issues even though they have been interpreted as falling within the scope of matters arising under or involving the interpretation of the Constitution.<sup>204</sup>
- ?? Exclude the requirement for notices in magistrates courts and other lower courts.
- ?? Confer a discretion on judges of superior courts (including the High Court) in which a constitutional issue to determine whether a notice should be given in the particular circumstances. The court might determine that a case that has no reasonable prospect of success on a constitutional issue and does not require the issuing of a notice. The court could have a discretion as to whether a matter should be stayed pending the responses of the Attorneys-General or whether the case should continue, with a right for the Attorneys-General to make a response at a later time, possibly at any time up until judgment. The court could also be given a discretion to consider the impact of issuing a s 78B notice on cases where urgent interlocutory relief is sought. One option would be to allow the court to issue a notice but also grant the urgent interlocutory relief where that was appropriate. The court's discretion could take into account non-exhaustive criteria to assist in the exercise of the discretion such as the significance and merit of the constitutional issue, whether there is uncertainty about the meaning of a statutory provision,

203 H Burmester *Correspondence* 26 July 2000. Also see eg *Joosse v Australian Securities & Investment Commission* (1998) 73 ALJR 232 alleging the invalidity of federal and state legislation on the grounds of a 'break in sovereignty' in Australia and irregularities in having treaties registered as international arrangements; *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383 where an argument was raised that the Australian Taxation Office did not exist for legal purposes; *McKewins Hairdressing and Beauty Supplies Pty Ltd (In liq) v Deputy Commissioner of Taxation* (2000) 171 ALR 335, questioning the constitutional validity of the *Income Tax Assessment Act 1936* (Cth).

204 *Ex Parte McLean* (1930) 43 CLR 472, 482 (Dixon J).

whether the matter has recently been considered by the High Court, the rights and interests of the parties, and the interests of the administration of justice.

- ?? Amend section 78B to allow Attorneys-General to make written submissions on the constitutional issue to the court before judgment is given. This could avoid the problem of proceedings being halted to issue notices but still provide the Attorneys-General with an opportunity to present their views on the matter.
- ?? Broaden the discretion of the court to proceed with a cause provided that reasonable notice is given to the Attorneys-General so that they may intervene before the conclusion of the proceedings. In conjunction with this possibility, the current stipulation of a ‘reasonable time’, might be replaced by a specified period — say, for example, 7 or 14 days.

**Question 3.48.** Should the requirements for notices given under s 78B of the *Judiciary Act* be changed to

- ?? exclude particular subject areas, such as arguments relating to inconsistency under s 109 of the Constitution
- ?? exclude matters in lower courts
- ?? confer discretion on superior courts hearing such matters to determine whether a notice is required in all the circumstances
- ?? include a specific duty on a court to consider of its own motion whether a s 78B notice is required in a particular case
- ?? allow a court to proceed with the cause, provided reasonable notice is given to the Attorneys-General of the constitutional questions
- ?? replaced the ‘reasonable notice’ requirement to a specified period, such as 7 or 14 days?

### **Intervention by Attorneys-General — section 78A**

3.211 Section 78A is another provision in the *Judiciary Act* dealing with constitutional matters. Section 78A(1) enables the Attorney-General of the Commonwealth or of a state<sup>205</sup> to intervene in proceedings before the High Court, any other federal court, or any court of a state or territory, when those proceedings relate to a matter arising under the Constitution or involving its interpretation. This provision was introduced by the *Judiciary Amendment Act 1976* (Cth). Prior to this the Attorney-General of the Commonwealth or a state could intervene in proceedings only by leave of the court.

<sup>205</sup> s 78AA JA states that in this Division ‘State’ includes the ACT and the Northern Territory.

3.212 Section 78A(2) provides for the court to make such order as to costs as it sees fit against the Attorney-General of the Commonwealth or a state in such proceedings. The aim of this provision is to protect litigants from having to pay increased costs as a result of intervention.<sup>206</sup>

3.213 The Commission's report *Standing in public interest litigation*<sup>207</sup> recommended broadening the laws on standing in public interest litigation generally. In relation to the intervention by the Attorney-General of the Commonwealth or a state it recommended in draft legislation that the person intervening become a party to the proceedings.<sup>208</sup> Subsequently, in 1988, s 78A was expanded to include subsections (3) and (4).<sup>209</sup>

3.214 Section 78A(3) provides that where the Attorney-General of the Commonwealth or of a state intervenes in proceedings, he or she shall be taken to be a party to the proceedings. In *Cheesman v Walters* the Full Court of the Federal Court held that an Attorney-General is a party to the proceedings for the purposes of O 52 r 14 FCR with all the rights and responsibilities of a party, including the right to appeal.<sup>210</sup>

3.215 Section 78A(4) allows a costs order to be made against the Attorney-General in any appeal instituted by the Attorney-General from a judgment given in proceedings in which he or she intervened.

3.216 One view is that there is no well-developed jurisprudence about the circumstances that warrant intervention by Attorneys-General and those that do not.<sup>211</sup> For example, it is argued that the courts have failed to distinguish adequately between intervention of an Attorney-General as an interested party or as *amicus curiae*. The latter term is used to refer to a 'friend of the court' who is allowed to give disinterested advice to the court on a point of law but is not a party to the proceedings.

3.217 One option would be to include in s 78A a non-exhaustive list of criteria for determining whether intervention should be permitted. This could include factors such as the public importance of the case, the level of public debate, its likely impact on social, economic or political matters, and its precedential value.

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206 *Hansard* (Sen) 16 Nov 1976, 1958.

207 Australian Law Reform Commission Report 27 *Standing in public interest litigation* Sydney 1986 (ALRC 27). See also Australian Law Reform Commission Report 78 *Beyond the door keeper: standing to sue for public remedies* Sydney 1996 (ALRC 78).

208 ALRC 27, 218.

209 *Statute Law (Miscellaneous Provisions) Act 1988* (Cth).

210 (1997) 148 ALR 21.

211 AGS Consultation 5 June 2000.



3.218 Another issue is whether the effect of s 78A extends beyond constitutional issues. Although the Attorney-General has traditionally been regarded as representing the public interest, he or she may not intervene as of right in ordinary non-constitutional litigation on a matter of public policy.<sup>212</sup> The Commonwealth Attorney-General's position in the past has been that intervention is in relation to the whole proceedings and may therefore go beyond the constitutional issue.<sup>213</sup>

3.219 This issue was raised recently in *DJL v Central Authority*.<sup>214</sup> Following the intervention of the Commonwealth Attorney-General, the appellant gave notice of a further constitutional question, namely the right of the Attorneys-General of the Commonwealth and the states, purportedly pursuant to s 78A, to intervene in her appeal and to become parties to proceedings that related to a matter arising under the Constitution. Eventually, the last-mentioned question was not pursued when the Commonwealth Attorney-General sought and obtained the leave of the High Court to intervene and the Attorneys-General for the states and territories present did not press a claim to be heard.<sup>215</sup>

3.220 Sir Anthony Mason has commented that further attention needs to be given to the criteria for granting intervener status and *amicus curiae* status, and to the procedures to be followed and entitlements arising from the grant of such status.<sup>216</sup> There is also the question whether more use should be made of interveners and *amici curiae*.<sup>217</sup> Generally, aside from s 78A JA, some Australian courts have favoured a more liberal approach to permitting interveners and *amici curiae*.<sup>218</sup> In the case of *Levy v Victoria*<sup>219</sup> Kirby J recommended that the High Court should adapt its procedures, particularly in constitutional cases or where large issues of legal principle and legal policy are at stake, to ensure that its eventual opinions on contested legal questions are informed by relevant submissions and appropriate materials.

**Question 3.49.** Should s 78A of the *Judiciary Act* be amended to include a non-exhaustive list of criteria to be taken into account when determining whether intervention by an Attorney-General should be permitted?

212 S Kenny 'Interveners and amici curiae in the High Court' (1998) 20 *Adelaide Law Review* 159, 160.

213 AGS *Consultation* 5 June 2000.

214 (2000) 170 ALR 659.

215 id, 676–677 (Kirby J).

216 A Mason 'The evolving role and function of the High Court' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 122.

217 See for example ALRC 78, para 6.30.

218 *Levy v Victoria* (1997) 189 CLR 579, 651.

219 id, 651, 652.

**Question 3.50.** Should s 78A of the *Judiciary Act* be extended to non-constitutional issues in general, or to non-constitutional issues that arise in the same ‘matter’ as a constitutional issue? If so what should it provide?

## Transfers between courts: the Federal Magistrates Court

3.221 The *Federal Magistrates Act 1999* (Cth) provides for discretionary and mandatory transfers of proceedings from the Federal Magistrates Court to the Federal Court or the Family Court. This recently enacted legislation provides a valuable source of comparison for other inter-court transfer procedures within the federal judicial system. Significantly, this legislation does not provide for a transfer of specific issues by way of a case stated, but for the transfer of an entire proceeding to another federal court for disposition by that court.

3.222 The discretionary system is provided by s 39 FMA, which enables the Federal Magistrates Court to transfer a proceeding to the Federal Court or the Family Court on the application of a party or of its own initiative. In deciding whether to transfer, the Court must have regard to

- ?? any Rules of Court
- ?? whether proceedings in respect of an associated matter are pending in the relevant court (that is the Federal Court or the Family Court)
- ?? whether the resources of the Federal Magistrates Court are sufficient to hear and determine the proceedings, and
- ?? the interests of the administration of justice.

3.223 If a transfer order is made, the Federal Magistrates Court may make such orders as it considers necessary pending the disposal of the proceeding by the Federal Court or the Family Court as the case requires. An appeal does not lie from a decision of the Federal Magistrates Court in relation to a transfer order. The regulations can exclude certain proceedings from the operation of the transfer proceedings.

3.224 Section 40 FMA enables Rules of Court to make provision in relation to discretionary transfer in consultation with the Federal Court and the Family Court. The Rules may set out the factors that are to be taken into account by the Federal Magistrates Court in deciding whether to transfer. In making Rules of Court for this purpose, the federal magistrates, or a majority of them, must have regard to

- ?? whether particular matters could be more appropriately dealt with in the Federal Court or the Family Court

- ?? whether the resources of the Federal Magistrates Court are sufficient to deal with particular matters
- ?? the interests of the administration of justice, and
- ?? anything else that the federal magistrates, or a majority of them, consider relevant.

3.225 Section 41 FMA provides for mandatory transfer. The regulations can prescribe the kind of proceedings that must be transferred. If a proceeding is so transferred, the Federal Magistrates Court may make such orders as it considers necessary pending the disposal of the proceeding by either the Federal Court or the Family Court. An appeal does not lie from a decision by the Federal Magistrates Court in relation to such transfer. Section 41 also provides that the Minister must cause a copy of the ‘transfer regulations’ made under s 41 to be tabled in each House of the Parliament, where they are subject to disallowance. To date, the Court has issued no Rules of Court or regulations relevant to transfer.

**Question 3.51.** Are there any features of the transfer proceedings under the *Federal Magistrates Act* that should be adopted or adapted in relation to other federal court transfer powers?

## **Related mechanisms**

3.226 In paragraph 3.3–3.7 it was stated that mechanisms for the transfer of proceedings between and within courts exercising federal jurisdiction bear some similarities to other common law or statutory mechanisms for staying or transferring matters. This section examines these analogous mechanisms in so far as they present alternative models of reform or inform the mechanisms already considered

### **Forum non conveniens**

3.227 Forum non conveniens is a common law doctrine of private international law by which a court may, in its discretion, decline to exercise jurisdiction that it is technically entitled to exercise when the interests of the parties and the administration of justice would be better served by resolving the dispute in another forum. Factors taken into account by a court when exercising its discretion include the ease of access to relevant sources of evidence; the location and availability of witnesses; the residence of the parties; the subject matter of the action; the place where the relevant events occurred; and the substantive law applicable to the action.

3.228 The leading authority on the applicability of the doctrine in Australia is the High Court's decision in *Voth v Manildra Flour Mills Pty Ltd.*<sup>220</sup> The majority held that, where the defendant is served originating process within the forum and seeks a stay of proceedings, the stay will be granted if it can be shown that the local court is a 'clearly inappropriate forum' for the determination of the dispute.<sup>221</sup>

3.229 The majority chose not to follow the House of Lords decision in *Spiliada Maritime Corp v Cansulex Ltd.*,<sup>222</sup> which held that a stay of local proceedings should be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum with competent jurisdiction which is the most appropriate forum for the trial of the action. It was for the defendant to establish that 'there is another available forum which is clearly or distinctly more appropriate than the English forum'. According to Lord Goff of Chieveley in *Spiliada*, the 'natural forum' was that with which the action had the 'most real and substantial connection' and his Lordship identified the relevant connecting factors pointing to some other forum as including 'not only factors affecting convenience or expense (such as the availability of witnesses), but also factors such as the law governing the relevant transaction, and the places where the parties respectively reside or carry on business.'<sup>223</sup>

3.230 In *Voth* the majority of the High Court concluded

The 'clearly inappropriate forum' test is similar and, for that reason likely to yield the same result as 'the more appropriate forum test' in the majority of cases. The difference between the two tests will be of critical significance only in those cases — probably rare — in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one. But the question that the former test presents is slightly different in that it focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums.<sup>224</sup>

3.231 Common law principles such as forum non conveniens are relevant to this inquiry for several reasons.

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220 (1990) 171 CLR 538. The doctrine of forum non conveniens no longer applies to international child abduction cases: see *P v S* (1994) 181 CLR 639.

221 The same test is applied to cases where the defendant is served out of the jurisdiction pursuant to rules of court and a challenge is subsequently made to the court's jurisdiction. This was the situation in *Voth*, where the defendant was served originating process in Missouri, USA.

222 [1987] AC 460.

223 id, 478.

224 (1990) 171 CLR 538, 558.

- ?? The common law applies in areas not covered by federal law. For example, under s 80 JA, *forum non conveniens* as part of the common law in Australia is applicable to the exercise of federal jurisdiction so far as it is not inconsistent with the Constitution and the laws of the Commonwealth.
- ?? The common law has been used as a guide in interpreting the meaning of existing legislative provisions. For example, several state cases suggest that *forum non conveniens* is relevant to interpreting the transfer provisions under the cross-vesting legislation (see s 5 JCCVA).
- ?? When developing proposals for law reform, the common law provides useful analogies as to the types of problems that can arise in this context or as to the criteria that should be considered when formulating structured statutory discretions.

3.232 However, there are some significant limitations on the common law doctrine in Australia. Factors such as court congestion and limited judicial resources, while accepted in the United States as relevant to the issue of *forum non conveniens*, are not relevant in Australia. This has led to some criticism of the current Australian law. As Spigelman CJ commented in *James Hardie Industries Pty Ltd v Grigor*

Uninstructed by authority, I would have given weight to considerations of policy with respect to the call on the limited resources available for the administration of justice in New South Wales. I refer to resources generally available, not specifically the resources of the Dust Diseases Tribunal which are, as a matter of budgetary practice, part of an amount which could be reallocated. It is by no means clear to me that a foreign resident suing on a foreign tort should be entitled to the advantages of a special regime developed for the benefit of Australian residents. The demands on judicial resources are now such that this should be a permissible element in the exercise of the jurisdiction to stay proceedings.<sup>225</sup>

### **Service and Execution of Process Act 1992 (Cth)**

3.233 The original *Service and Execution of Process Act 1901* (Cth) allowed process commencing civil proceedings in state and territory courts to be served outside the state or territory concerned throughout Australia. However, the Act entrenched a number of technical requirements and procedures that created impediments to the nationwide service and execution of state court process. For example, in relation to civil proceedings, if the defendant made no appearance in response to service the plaintiff had to seek leave of the court to proceed in the defendant's absence.<sup>226</sup> That procedure required the plaintiff to demonstrate that a number of requirements had been satisfied, including that the writ was properly served or that reasonable efforts had been made to effect service. Moreover, the

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<sup>225</sup> (1998) 45 NSWLR 20, 40–41.

<sup>226</sup> *Service and Execution of Process Act 1901* (Cth) s 11.

plaintiff had to show that the case fell within one of the nexus requirements defining a relevant connection between the subject matter of the action or the parties and the forum.<sup>227</sup> This procedure led to litigation concerning whether sufficient nexus had been shown, with defendants often raising arguments to delay or defeat the process of litigation.<sup>228</sup>

3.234 In its 1987 report, *Service and Execution of Process* the Commission recommended the removal of those technicalities and the introduction of a more streamlined process that would recognise and facilitate the large degree of social, economic and commercial integration in Australia.<sup>229</sup> The Commission's report formed the basis of the *Service and Execution of Process Act (1992)* (Cth) (SEPA). The introduction of the Act in 1992 was a significant example of a growing trend to reduce legal technicality and introduce more liberal rules and procedures in the allocation and transfer of matters within and between jurisdictions.

3.235 Section 20 SEPA enables certain courts to stay proceedings on the application of a person who has been served with originating process under the Act. The court may order that proceedings be stayed if it is satisfied that a court of another state that has jurisdiction to determine the matter is the appropriate court to determine those matters. It has been suggested that the *Service and Execution of Process Act* confers a more liberal test for staying proceedings than the common law principles applied in *Voth* (see paragraph 3.230).<sup>230</sup> Under s 20, matters to be taken into account by the court include

- ?? the places of residence of the parties and of witnesses likely to be called in the proceeding
- ?? the place where the subject matter of the proceeding is situated
- ?? the financial circumstances of the parties
- ?? any agreement between the parties about the court or place in which the proceeding should be instituted
- ?? the law that would be the most appropriate to apply in the proceeding, and
- ?? whether a related or similar proceeding has been commenced against the person served or another person.

3.236 The fact that the proceeding was commenced in a particular place is not to be taken into account in deciding whether to stay a proceeding on the basis that the Act effectively confers on the state courts an 'Australia-wide' jurisdiction in personam. The court's order may be made subject to such conditions as the court considers just and appropriate in order to facilitate determination of the matter in

227 *ibid.*

228 Australian Law Reform Commission Report 40 *Service and Execution of Process* AGPS Canberra 1987, para 88–100 (ALRC 40).

229 ALRC 40, para 5–8.

230 The Law Book Company Limited *The laws of Australia* 5 Civil Procedure 5.7–5.11.

issue without delay or undue expense (s 20(5)). The power provided by s 20 does not apply where a Supreme Court is the court of issue (s 20(1)) because Supreme Courts are covered by the cross-vesting legislation considered below. Section 20 is not intended to affect the operation of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) or a corresponding law of a state (s 20(10)).

3.237 Stays granted under s 20 SEPA are unilateral in that they halt proceedings that have been commenced inappropriately, but leave it to the plaintiff to determine whether or not fresh proceedings will be commenced in an appropriate forum. This makes it a less-sophisticated tool than the transfer provisions of the cross-vesting legislation.

### **Transfers under the cross-vesting scheme**

3.238 The terms of reference exclude matters relating to the cross-vesting of jurisdiction. While the Commission does not intend to comment on the structural aspects of the cross-vesting scheme, the legislation is relevant in the present context because of its provisions relating to the transfer of proceedings between courts.<sup>231</sup>

3.239 On 1 July 1988, a national scheme for cross-vesting jurisdiction between Australian superior courts commenced operation.<sup>232</sup> The scheme has two main features which operate independently but are related. The first — and structural — part of the scheme cross-vests the subject matter jurisdiction of participating courts. The second — and operational — part of the scheme provides for the transfer of proceedings between those courts. The courts participating in the scheme are the Federal Court and the Family Court, the Supreme Courts of the six states, the Supreme Courts of the two internal territories (the Northern Territory and the Australian Capital Territory) and the Family Court of Western Australia. The scheme excludes from its ambit the High Court, criminal proceedings<sup>233</sup> and four federal Acts.<sup>234</sup> It also excludes the lower state courts from the structural provisions that relate to cross-vested jurisdiction although it does encompass these courts in the transfer provisions.

3.240 So far as the structural aspect of the scheme is concerned, the pivotal provisions are those vesting the subject matter jurisdiction of participating courts in other participating courts, subject to certain exceptions. For example, s 4 JCCVA vests the jurisdiction of the Federal Court and the Family Court in each of the state

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231 Cross-vesting is also discussed in the context of the jurisdiction of the Federal Court in Ch 2.

232 The following material is based on B Opeskin 'Cross-vesting of jurisdiction and the federal judicial system' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 299.

233 s 3(1) JCCVA.

234 *Conciliation and Arbitration Act 1977* (Cth), *Workplace Relations Act 1966* (Cth), *Native Title Act 1993* (Cth), and certain provisions of the *Trade Practices Act 1974* (Cth).

Supreme Courts and, reciprocally, s 4 of the corresponding state Acts confers jurisdiction in 'State matters' on the Federal Court and the Family Court. Likewise, the jurisdiction of each state and territory Supreme Court is cross-vested in all the other state and territory Supreme Courts.

3.241 The second central feature of the cross-vesting scheme relates to the transfer of proceedings between participating courts. As a result of the cross-vesting of jurisdiction, it is possible for a litigant to commence most proceedings in any of the participating courts without regard to the subject matter of the action. However, it was always intended that federal and state courts keep within their traditional jurisdictional fields. To this end, the legislation provides for the transfer of proceedings between participating courts at the initiative of a party to the proceeding, an Attorney-General, or the court of its own motion (see s 5 JCCVA).

3.242 To a very large extent the transfer provisions are the lynchpin of the cross-vesting scheme. Unless proceedings are transferred in such a way that each participating court keeps within its 'proper' jurisdictional fields, there is the potential for a dramatic redistribution of jurisdiction between state and federal courts in Australia.<sup>235</sup>

### *Criteria for transfer*

3.243 Section 5 JCCVA and corresponding state Acts place an obligation on a court to transfer a pending matter to another participating court where it would be more appropriate for the other court to hear the matter, having regard to a number of factors. The factors relevant to the exercise of the discretion include the following

- ?? the existence of related proceedings in another court
- ?? whether the chosen forum would have had jurisdiction in the absence of the cross-vesting scheme
- ?? whether the interpretation of a Commonwealth law or state law of another jurisdiction is in issue, and
- ?? the interests of justice.

3.244 The breadth of the discretion and the inability to appeal a transfer decision has led to some uncertainty in its application. Australian courts have applied two different approaches to the issue of a transfer of proceedings under s 5.<sup>236</sup> The New South Wales Court of Appeal articulated the most widely accepted approach in *Bankinvest AG v Seabrook*.<sup>237</sup> This case treats a transfer decision as a matter of

<sup>235</sup> *Hansard* (H of R) 22 October 1986, 2557 (Bowen).

<sup>236</sup> See generally G Moloney & s McMaster *Cross-vesting of jurisdiction: A review of the operation of the national scheme* AIJA Melbourne 1992, 81–103.

<sup>237</sup> (1988) 14 NSWLR 711.



judicial management which should be undertaken without excessive legalism. Street CJ stated that a decision to transfer a proceeding called for

a ‘nuts and bolts’ management decision as to which court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute. Consideration of textured principle and deep learning — in particular principles of international law such as *forum non conveniens* — have no place in a cross-vesting adjudication.<sup>238</sup>

3.245 Rogers AJA also stated that the interests of justice were the only lodestar that a judge may steer by and that principles of *forum non conveniens* had no role to play in the resolution of applications made under the legislation.<sup>239</sup> Thus, there could be no presumption that a court ought to exercise jurisdiction that had been regularly invoked by the plaintiff, nor that a defendant should bear an onus of proving that the criteria for transfer had been satisfied.

3.246 An alternative approach adopted by courts in the ACT and Western Australia is to exercise the discretion to transfer in the light of pre-existing principles of private international law.<sup>240</sup> Under these principles, a plaintiff’s initial choice of forum has significant bearing on the disposition of a defendant’s transfer application because of the presumption that a court ought to exercise jurisdiction that has been regularly invoked by the plaintiff. As a corollary, if a defendant seeks to have the proceedings transferred to another court, he or she bears the onus of proving that the grounds for a transfer are satisfied.

3.247 Several commentators have remarked on the inappropriateness of interpreting the transfer provisions by reference to the common law principles of private international law for the following reasons:

- ?? the common law principles are not necessarily appropriate to a statutory scheme established for the purpose of remedying problems in the Australian judicial system
- ?? the High Court has developed those principles in the context of international cases, without regard to considerations relevant to a federal system, and
- ?? some aspects of the more restrictive approach — such as whether anyone bears an onus of proof — are difficult to reconcile with the ability of a court to transfer a proceeding of its own motion.<sup>241</sup>

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<sup>238</sup> id, 714 (Street CJ).

<sup>239</sup> id, 726–7 (Rogers AJA).

<sup>240</sup> *Waterhouse v Australian Broadcasting Corporation* (1989) 86 ACTR 1; *Mullins Investments Pty Ltd v Elliott Exploration Co Pty Ltd* [1990] 1 WAR 531.

<sup>241</sup> See for example P Nygh *Conflict of laws in Australia* 6th ed Butterworths Sydney 1995, 91–2. Difficult questions arise when applications for a stay (at common law) or a transfer (under the legislation) are sought concurrently: *McEntee v Connor* (1994) 4 Tas R 18; *Pegasus Leasing Ltd v Balescope Pty Ltd* (1994) 63 SASR 51; *Schmidt v Che Sul Won* [1998] 3 VR 435.

3.248 For a national scheme that is intended to operate with significant uniformity, the development of a ‘wilderness of conflicting and unappealable decisions’ under s 5 is a source of concern.<sup>242</sup> To this end, a 1992 report on the scheme recommended that the major interpretational questions be referred to the Standing Committee of Attorneys-General with a view to resolving them by legislative means.<sup>243</sup> No changes have yet been made.

### *Special federal matters*

3.249 A ‘special federal matter’ is defined in s 3(1) JCCVA to include, inter alia, certain matters arising under Part IV of the *Trade Practices Act 1974* (Cth), under the Competition Code, or from judicial review of federal administrative action.

3.250 Where a special federal matter is pending in a state Supreme Court, that court must transfer the matter to the Federal Court (or other specified court) unless the Supreme Court makes an order to retain the matter. In making a retention order, the Supreme Court must be satisfied that there are special reasons for doing so unrelated to the convenience of the parties. The court must also have regard to the general rule that the Federal Court should hear special federal matters, and it must take into account any submission made by the Commonwealth Attorney-General.<sup>244</sup> The practical effect of these provisions is that, notwithstanding that state Supreme Courts generally have cross-vested jurisdiction in relation to special federal matters, it is rare for a Supreme Court to determine such a matter.<sup>245</sup>

3.251 The provisions relating to special federal matters were introduced to recognise the special expertise of the Federal Court in matters in which it had exclusive original jurisdiction prior to the commencement of the cross-vesting scheme. In addition, it was thought desirable that matters of particular concern to the Commonwealth should be determined in a court of its choice.<sup>246</sup> In 1992–93 amendments were enacted in all jurisdictions to make it more difficult for a state court to retain a special federal matter, in recognition of the special role of the Federal Court.<sup>247</sup>

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242 *Re Chapman and Jansen* (1990) 13 Fam LR 853, 869 (Fogarty J).

243 G Moloney & s McMaster *Cross-vesting of jurisdiction: a review of the operation of the national scheme* AIJA Melbourne 1992, 103.

244 s 6 JCCVA.

245 G Moloney & s McMaster *Cross-vesting of jurisdiction: a review of the operation of the national scheme* AIJA Melbourne 1992, 103–4.

246 *Metroplaza Pty Ltd v Girvan NSW Pty Ltd (in liq)* (1991) 24 NSWLR 718, 722.

247 See, for example, *Law and Justice Amendment Act (No 3) 1992* (Cth).

***Re Wakim's limited impact on transfer***

3.252 In *Re Wakim; Ex parte McNally*,<sup>248</sup> the High Court ruled that state courts may be invested with federal jurisdiction pursuant to s 77(iii) of the Constitution, but that the Constitution does not permit federal courts to be invested with state jurisdiction.

3.253 The transfer provisions are valid despite the decision in *Re Wakim* although the scope for their operation is now reduced. This is because significant parts of the cross-vesting scheme survive that decision, and because the transfer provisions operate independently of the provisions with respect to the cross-vesting of jurisdiction. As a result, a matter may be transferred between participating courts irrespective of whether cross-vested jurisdiction is being exercised. It is clear, however, that both the transferor court and the transferee court must have jurisdiction from some source in order to effect a transfer.

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248 (1999) 198 CLR 511.

## 4. Appellate jurisdiction of federal courts

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### Introduction

4.1 The Australian High Court has remarked on several occasions that appeals are unknown to the common law — they are creatures of statute.<sup>1</sup> In England, there existed a limited form of review by writ of error — an original proceeding before another court, which was restricted to errors in the formal record of the decision.<sup>2</sup> It was not until the *Judicature Act 1873* (UK), when the English Court of Appeal was established, that a statutory right of appeal was created in English courts. During the 19<sup>th</sup> century, some Australian colonies had a local court of appeals, which was established in the form of the Governor in Council. The Privy Council also heard appeals from the local Supreme Court, as of right, by leave of that Court, or by special leave of the Privy Council.<sup>3</sup> An Australian court of appeal was proposed as early as 1849 but was not established until federation.<sup>4</sup>

4.2 In Australia today, the appellate jurisdiction of federal courts has a statutory basis, which is supplemented by the requirements of Chapter III of the Constitution. Rights and procedures in relation to appeals in federal courts are derived from federal legislation, in particular the *Judiciary Act*, the *Federal Court of Australia Act*, the *Family Law Act* and the *Federal Magistrates Act*.

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1 *CDJ v VAJ* (1998) 197 CLR 172, 196–197 (McHugh, Gummow and Callinan JJ); *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585, 605 (Kirby J).  
2 J Crawford *Australian courts of law* 3rd ed Oxford University Press Melbourne 1993, 14.  
3 *id.*, 26.  
4 *ibid.*

4.3 The terms of reference of this inquiry require the Commission to report on whether any changes to the exercise of federal jurisdiction in civil matters are desirable, having regard to any constitutional limitations on the exercise of the judicial power of the Commonwealth. One key aspect of the allocation and exercise of federal civil jurisdiction is appellate jurisdiction.

4.4 The purpose of this Chapter is to consider possible reforms to the federal appellate system to achieve its objectives more effectively and efficiently, given the constraints of time and resources. The Chapter first outlines the constitutional framework for the exercise of appellate jurisdiction in federal courts, before outlining the different avenues of appeal to the High Court, the Federal Court and the Family Court.<sup>5</sup> The Chapter then discusses the following issues

- ?? 'cross jurisdictional appeals' from state courts to federal courts
- ?? whether first appeals should be by right or by leave of the court
- ?? whether second appeals should be by right or by leave of the court, including an analysis of the High Court's special leave requirements and whether the principal exception to those requirements (namely, appeals from the Family Court under s 95(b) FLA) require any change
- ?? the structure of intermediate appellate courts
- ?? the composition of intermediate appellate courts, and
- ?? the option of a national appellate court.

4.5 As noted in Chapter 1, the Commission's recent report, *Managing justice: A review of the federal civil justice system*,<sup>6</sup> also considered issues relating to the federal appellate process. However, while that report focused on procedural concerns regarding appeals, this Chapter focuses principally on jurisdictional aspects of appellate proceedings and structural issues arising from the *Judiciary Act* and related Acts.

4.6 In this Chapter the Commission also considers appeals from the Federal Magistrates Court established under the *Federal Magistrates Act 1999* (Cth) to the Federal Court and the Family Court. The Federal Magistrates Court began operation on 3 July 2000 and sufficient time has not yet passed to assess its operations fully. Nevertheless, the Commission considers it important to discuss appeals from the Federal Magistrates Court because of its new and significant role in exercising federal jurisdiction. The Court is Australia's first lower level federal court and has original jurisdiction in matters such as family law and child support, administrative law, bankruptcy and consumer protection.<sup>7</sup> It shares its jurisdiction with the Federal Court and the Family Court and there is a legislative arrangement

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5 While the Federal Magistrates Court is a federal court it mainly exercises original jurisdiction. See para 4.6.

6 ALRC 89.

7 *Federal Magistrates (Consequential Amendments) Act 1999* (Cth).

for the transfer of matters between the courts (see Chapter 3). The Federal Magistrates Court exercises no general appellate jurisdiction of its own<sup>8</sup> and all appeals from that court go to the Family Court, the Federal Court or possibly in very limited circumstances, the High Court.<sup>9</sup>

### The nature of appeals

4.7 There are many forms of proceeding that come within the general description of ‘appellate’ proceedings. Indeed, because appeals are predominantly creatures of statute, the forms of appellate proceedings are as varied as the legislation provides. For example, legislation may differ as to the extent to which provision is made to re-examine the facts decided at first instance. In some cases, therefore, an ‘appellate’ court may exercise both appellate and original jurisdiction in the course of determining the matter before it.

4.8 The High Court has recently explained the many types of appeal in the context of discussing appeals determined by a Full Bench of the Australian Industrial Relations Commission. Gleeson CJ, Gaudron and Hayne JJ remarked as follows

[11] It was pointed out in *Brideson [No 2]* that ‘the nature of [an] appeal must ultimately depend on the terms of the statute conferring the right [of appeal]’. The statute in question may confer limited or large powers on an appellate body; it may confer powers that are unique to the tribunal concerned or powers that are common to other appellate bodies. There is, thus, no definitive classification of appeals, merely descriptive phrases by which an appeal to one body may sometimes be conveniently distinguished from an appeal to another.

[12] It is common and often convenient to describe an appeal to a court or tribunal whose function is simply to determine whether the decision in question was right or wrong on the evidence and the law as it stood when that decision was given as an appeal in the strict sense. An appeal to this Court under s 73 of the Constitution is an appeal of that kind. In the case of an appeal in the strict sense, an appellate court or tribunal cannot receive further evidence and its powers are limited to setting aside the decision under appeal and, if it be appropriate, to substituting the decision that should have been made at first instance.

[13] If an appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should have been made at first instance, the appeal is usually and conveniently described as an appeal by way of rehearing. Although further evidence may be admitted on an appeal of that kind, the appeal is usually conducted by reference to the evidence given at first instance and is to be contrasted with an appeal by way of hearing de novo. In the case of a hearing de novo, the matter is heard afresh and a decision is given on the evidence presented at that hearing.<sup>10</sup>

8 The Court has jurisdiction to hear ‘appeals’ from the Administrative Appeals Tribunal transferred to it by the Federal Court under s 44A of the *Administrative Appeals Tribunal Act 1975* (Cth). If the Administrative Review Tribunal is put in place, the Federal Magistrate Court will also have jurisdiction under cl 170 of the Administrative Review Tribunal Bill 2000.

9 See para 4.42, 4.46, 4.48, 4.52–4.54.

10 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47 (31 August 2000), para 11–13.

4.9 The Constitution may also impact on the nature of the appellate jurisdiction exercised by a federal court (see paragraphs 4.20–4.34). For example, in *Eastman v R*<sup>11</sup> the High Court indicated that constitutional limitations on the Court’s original jurisdiction had implications for the nature of review that could be undertaken by the Court on appeal.

**Question 4.1.** Should federal legislation specify the precise nature of the appeal undertaken by federal courts? If so, and subject to the requirements of the Constitution, should a federal appellate court be able to consider changes in the law since the date of the judgment under appeal, or receive further evidence?

### **The role of federal appellate courts**

4.10 Trial courts have an essential role in the primary resolution of disputes between parties. Appellate courts make fewer decisions and resolve fewer disputes. Yet they have an equally important function in correcting errors made by lower courts and, to varying degrees, formulating and explaining legal principles and providing authoritative interpretations of the Constitution, legislation and the common law.

4.11 The main aims of the federal appellate system, as with any system of appellate justice, are

- ?? to correct errors in the decisions of trial courts or in the reasoning used by them in reaching those decisions, and
- ?? to ensure legal consistency by clarifying, declaring, harmonising and developing the law and its practice and procedures.<sup>12</sup>

4.12 Lord Woolf, in his review of the civil justice system in England and Wales, referred to the second of these objectives as ‘the public purpose’ of appeals and emphasised the role that appeals have in ensuring public confidence in the administration of justice.<sup>13</sup> Sir Geoffrey Bowman, in his report on the English Court of Appeal (Civil Division) stated that

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<sup>11</sup> (2000) 172 ALR 39.

<sup>12</sup> D Ipp ‘Reforms to the adversarial process in civil litigation — Part II’ (1995) 69 *Australian Law Journal* 790, 811.

<sup>13</sup> Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996 (Woolf final report), 153.

[t]he purpose of an appeals system, in our view, is not simply to correct wrong decisions as far as they concern the parties to the disputes: there is also a public purpose which is to ensure confidence in the administration of justice and, in appropriate cases, to clarify the law, practice and procedures and to help maintain the standards of first instance courts and tribunals.<sup>14</sup>

4.13 This Chapter examines the appellate role of the High Court, as the final court of appeal for Australia, and the role of federal intermediate courts of appeal, such as the Full Court of the Federal Court and the Full Court of the Family Court. Traditionally it is said that the function of error correction predominates in intermediate appellate courts, while the legal development function predominates in a final appellate court. While this is generally true, there are increasing expectations that intermediate appellate courts will perform much more of a role in legal development. This is because the High Court determines comparatively few appeals, and for most cases the intermediate appellate court provides the final determination of the issues in dispute.<sup>15</sup> If intermediate appellate courts do not fulfill this role in legal development, a significant part of the law of the relevant jurisdiction may be subject to outdated rules and principles for lengthy periods of time.<sup>16</sup>

4.14 The functions of the appellate system are crucial to the discussion in this Chapter of each of the issues identified in paragraph 4.4. Any reforms to the federal appellate system regarding rights to appeal, leave requirements, the composition of appellate courts, or the introduction of a new appellate court, need to be assessed in terms of their likely impact on the capacity of appellate courts to further the goals of error correction and legal development.

**Question 4.2.** How should the functions of error correction and legal development affect the role and operation of federal courts when determining (a) first appeals or (b) second appeals, within the Australian judicial system?

14 G Bowman *Review of the Court of Appeal (Civil Division) — Report to the Lord Chancellor* Lord Chancellor's Dept London 1997 (Bowman report), 2.

15 Figure 5 graphically illustrates the numerically small appellate workload of the High Court when compared with intermediate courts of appeal.

16 M McHugh 'Lawmaking in an intermediate appellate court: The New South Wales Court of Appeal' (1987) 11 *Sydney Law Review* 183, 188; M Kirby 'Permanent appellate courts: The debate continues' (1988) 4 *Australian Bar Review* 51, 57–8.



**Challenges facing federal appellate courts**

4.15 There is a widely held concern with the capacity of the federal appellate system to meet its objectives in the face of increasing demands for high quality, timely and cost effective appellate determinations. For example, the Federal Court's *Annual report* for 1999–2000 comments

[t]he appellate work of the Court continues to increase. Almost the same number of appeals were filed in 1999–2000 as in 1998–99, representing an increase of almost 150 per cent in the Court's appellate caseload since 1995–96.<sup>17</sup>

4.16 In response, the Federal Court's Management of Appeals Committee is considering a number of appellate issues including: the possibility of the Full Court delivering short form judgments in appropriate cases; promoting the issue of assisted dispute resolution for appeals; legislative amendments to broaden the categories of decisions requiring leave to appeal; and allowing certain categories of appeals to be determined by two judge benches.<sup>18</sup>

4.17 The Family Court has also reported that an increase in the number of appeals has made it more difficult for the Court to adhere to its six month standard for disposal of appeals from filing of notice of appeal to hearing.<sup>19</sup> In the reporting year 1999–2000, the Family Court recorded its third highest annual total of appeals filed since the Court commenced operations in 1976.<sup>20</sup> The Court is considering reform to its appellate procedures and the Court's Future Directions Committee has reported that work has commenced on a review of the procedures and services related to the management of appeals. Issues that are to be addressed include the provision of information to parties and practitioners, forms, interlocutory procedures, case management, listing arrangements, assistance to litigants in person, preparing and delivering judgments, and the appeal calendar.<sup>21</sup> A report on this work is expected by December 2000.

4.18 The High Court has also reported an increase in the number of civil appeals and civil special leave applications filed.<sup>22</sup>

4.19 In the face of these challenges, courts are actively engaged in considering reform to their appellate procedures. The Judges' Sub-Committee on the Harmonisation of Appellate Practice and Procedure, under the auspices of the Council of Chief Justices, produced a paper in 1999 identifying many issues

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17 Federal Court of Australia *Annual report 1999–2000*, 13.

18 id., 13, 64.

19 Family Court of Australia *Annual report 1998–1999*, 43.

20 id., 27.

21 Family Court of Australia *Future Directions Committee Report* July 2000, 47.

22 High Court of Australia *Annual report 1999–2000*, 5, 59, 63. For further discussion see para 4.173, 4.175.

concerning the effective case management of appeals.<sup>23</sup> The Australian Institute of Judicial Administration has also recently commissioned a report on appellate courts and the management of appeals in Australia.

## Constitutional framework

4.20 Chapter 2 of this Discussion Paper considered limitations on the original jurisdiction of federal courts arising from Chapter III of the Constitution, and in particular from sections 75 and 76. This section addresses the constitutional framework for the exercise of appellate jurisdiction by federal courts. As discussed further below, an important distinction must be drawn between the appellate jurisdiction of the High Court and that of other federal courts. Under s 73 of the Constitution, the High Court may exercise appellate jurisdiction in both state and federal matters. However, by implication from Chapter III of the Constitution, other federal courts may exercise appellate jurisdiction in federal matters alone. These limitations have significant bearing on the manner in which the Commonwealth Parliament may provide for channels of appeal to federal and state courts.

## Appellate jurisdiction of federal courts other than the High Court

4.21 Apart from the reference to the appellate jurisdiction of the High Court in s 73, the Constitution makes no mention of the appellate jurisdiction of federal courts. However, from the earliest years of federation, the High Court has regarded it as axiomatic that Parliament has power to confer appellate, as well as original, jurisdiction on courts. In *Ah Yick v Lehmert*, Griffith CJ said

[t]he term federal jurisdiction means authority to exercise the judicial power of the Commonwealth ... Then federal jurisdiction must include appellate jurisdiction as well as original jurisdiction ... Taking sec 71 into consideration, sec 77(i) means that the Parliament may establish any court to be called a federal court, and may give it jurisdiction to exercise any judicial power of the Commonwealth ... either by way of appellate or original jurisdiction ... There can be no doubt that Parliament might think to invest one court exclusively with original jurisdiction, another with appellate jurisdiction and another with both.<sup>24</sup>

4.22 The High Court has continued to uphold these views, with the result that appellate federal jurisdiction may be conferred by Parliament on federal courts (pursuant to s 77(i)) and on state courts (pursuant to s 77(iii)).<sup>25</sup> Moreover,

23 Council of Chief Justices, Judges' Sub-Committee on the Harmonisation of Appellate Practice and Procedure *Appellate practice and procedure in civil matters* 1999, 1–24.

24 (1905) 2 CLR 593, 603–4.

25 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 559 (Taylor J); *Cockle v Isaksen* (1957) 99 CLR 155; *New South Wales v Commonwealth* (1915) 20 CLR 54, 90 (Isaacs J); *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69, 114 (Starke J); *Queen v Spicer* (1957) 98 CLR 48; Z Cowen & L Zines *Federal Jurisdiction in Australia* 2nd ed Oxford University Press Melbourne 1978, 131–132.

pursuant to s 77(ii), Parliament may define the extent to which the appellate jurisdiction of a federal court is exclusive of that invested in a state. These arrangements provide considerable legislative choice in providing channels of appeal in federal matters. So long as the matter is federal in character, and leaving aside the merits of the arrangements, federal legislation might provide for appeals to be taken from federal court to federal court, federal court to state court, state court to state court, or state court to federal court. As discussed further below (see paragraphs 4.57–4.66), cross-jurisdictional appeals of the kind last mentioned are a distinct feature of current appellate arrangements. In supporting the practice, Cowen and Zines have remarked

it would be unfortunate if the Constitution prevented the implementation of the policy behind the Federal Court of Australia Act, which is to use the State Supreme Courts as trial courts in relation to many federal matters allowing an appeal to a special federal court.<sup>26</sup>

4.23 There is, however, an important constitutional limitation on the capacity of Parliament to confer appellate jurisdiction under Chapter III. Just as original federal jurisdiction conferred on federal and state courts must be confined to the class of matters identified in sections 75 and 76 of the Constitution, so too must appellate federal jurisdiction be confined to those matters. Cowen and Zines have made this point in remarking that the ‘courses’ of federal jurisdiction and state jurisdiction ‘run separately’, whether the jurisdiction be original or appellate.<sup>27</sup>

4.24 This principle was established by the High Court in *Collins v Charles Marshall Pty Ltd*.<sup>28</sup> In that case the Court emphasised that the Constitution specifically confers jurisdiction on the High Court to hear appeals from state courts, whether in state or federal jurisdiction (s 73), and confers power on Parliament to invest state courts with federal jurisdiction, whether original or appellate (s 77(iii)). However, the Constitution makes no provision for the exercise of state jurisdiction, appellate or otherwise, by other federal courts. It was held that the express nature of the conferring provisions makes them exhaustive. Therefore, in order for a grant of appellate federal jurisdiction to be valid, the matter arising on the appeal, not simply the matter arising in the original proceedings, must fall within the heads of s 75 or s 76 of the Constitution.<sup>29</sup>

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26 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 137. See also H Renfree *The federal judicial system of Australia* Legal Books Pty Ltd Sydney 1984, 379.

27 Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 135; also see *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 543, 563 (Taylor J).

28 (1955) 92 CLR 529.

29 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 541; Z Cowen & L Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed Oxford University Press Melbourne 1978, 133.

4.25 In Taylor J's view, the inability of a federal court (other than the High Court) to hear appeals from state courts exercising state jurisdiction, was a consequence of the federal judicial structure. No federal court created by Parliament could superintend the exercise of state judicial power.

To conclude otherwise would be to permit direct interference with the exercise by the courts of the States of State judicial functions...inconsistent with the maintenance of Federal and State judicial authority under the federal system erected by the Constitution.<sup>30</sup>

4.26 In *Gould v Brown*,<sup>31</sup> several members of the High Court affirmed the decision in *Collins*. Brennan CJ and Toohey J noted that, just as the High Court's appellate jurisdiction is confined to the terms of s 73 of the Constitution,

[s]ection 73 was also intended as an exhaustive statement of the appellate jurisdiction of federal courts in respect of State jurisdiction. For this reason, this Court has held that the terms of s 73(ii) preclude the Parliament of the Commonwealth from authorising an appeal to a federal court from the exercise of State jurisdiction by an inferior court of a State.<sup>32</sup>

### Appellate jurisdiction of the High Court

4.27 The High Court's appellate jurisdiction is distinct from that of other federal courts by virtue of s 73 of the Constitution, which confers jurisdiction on the Court to hear appeals in several classes of case. These are

- (a) appeals from a single judge of the High Court exercising original jurisdiction (s 73(i))
- (b) appeals from any other federal court (s 73(ii))
- (c) appeals from any court exercising federal jurisdiction (s 73(ii))
- (d) appeals from the Supreme Court of any state (s 73(ii))
- (e) appeals from any state court from which an appeal lay to the Privy Council in 1901 (s 73(ii)), and
- (f) appeals from the Inter-State Commission on questions of law (s 73(iii)).

4.28 Of the above matters, the first three ((a)–(c)) necessarily involve the exercise of appellate federal jurisdiction. The last matter (f) is today of little practical importance. However, the category (d) — appeals from the Supreme Court of any state — stands as a very significant addition to the appellate jurisdiction of the High Court. Since the Supreme Courts of the states exercise state jurisdiction, in addition to any federal jurisdiction conferred on them under s 77(iii), appeals taken

30 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 563. Issues of federalism and the integrity of state judicial systems are also discussed in respect of the powers of the Commonwealth Parliament over State courts exercising federal jurisdiction, above in Ch 2.

31 (1998) 193 CLR 346.

32 *id.*, 422.

to the High Court from those courts may involve the exercise of appellate state jurisdiction. As the above quotation from Brennan CJ and Toohey J in *Gould v Brown* indicates, this is the only circumstance in which a federal court may exercise appellate jurisdiction in state matters. This function emphasises the distinct role of the High Court as a *general* court of appeal in all matters of Australian law.

4.29 The distinction between the limited original jurisdiction of the High Court under sections 75 and 76, and its general appellate jurisdiction under s 73 has from time to time imposed constraints on the functions that the Court may perform when determining an appeal. This question arose recently in relation to the evidence that the High Court may consider in the course of an appeal. Because the original jurisdiction of the High Court is narrower than its general appellate jurisdiction under s 73, a conflict may arise when the Court, in hearing an appeal, is asked to consider fresh evidence that goes to issues beyond the limits of sections 75 and 76.

4.30 In *Eastman v R*,<sup>33</sup> the issue arose as to whether fresh evidence might be admitted in an appeal to the High Court from a decision of the ACT Supreme Court, made pursuant to the *Crimes Act 1900* (ACT), and upheld by a Full Court of the Federal Court. The fresh evidence was psychiatric opinion regarding the defendant's fitness to plead, which had not been raised before the trial judge or before the Federal Court on appeal. Gleeson CJ noted that '[i]t is not uncommon for intermediate appellate courts in Australia, including Courts of Criminal Appeal, to have conferred upon them, by statute, power to receive and act upon evidence which was not before the court of first instance' but that the High Court has no such power. The Chief Justice further noted that '[t]he authorities ... do not deny the capacity of Parliament to enact such legislation, at least in relation to appeals from courts exercising federal jurisdiction, but it has never done so'.<sup>34</sup>

4.31 A long line of High Court authority had established that, on an appeal under s 73 of the Constitution from a decision of a state court exercising state jurisdiction, the High Court has no power to receive new evidence.<sup>35</sup> The Court in *Eastman* followed these authorities in refusing to admit the evidence or to reopen 'what is by now, a very old question'.<sup>36</sup> A principal ground for the decision was that in the absence of legislation to the contrary, 'a court exercising strictly appellate jurisdiction is called upon to decide whether there was an error on the part of the court below, considering only the material which was before the court

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33 (2000) 172 ALR 39.

34 id, 42.

35 *Mickelberg v The Queen* (1989) 167 CLR 259 (Mason CJ, Brennan, Toohey and Gaudron JJ; Deane J dissenting.); *Ronald v Harper* (1910) 11 CLR 63, *Scott Fell v Lloyd* (1911) 13 CLR 230, *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 85, 87, 109–111, 113; *Groszlik v Grant (No 2)* (1947) 74 CLR 355, 357.

36 *Eastman v R* (2000) 172 ALR 39, 43 (Gleeson CJ).

below'.<sup>37</sup> Neither s 73 nor any federal Act modified this rule so as to permit fresh evidence in an appeal before the High Court. Such reasoning is equally applicable to an appeal to the High Court 'from another federal court, or a court exercising federal jurisdiction'.<sup>38</sup> This is because s 73 does not relevantly distinguish between appeals from state courts exercising state jurisdiction and appeals from courts exercising federal jurisdiction.<sup>39</sup>

4.32 An additional issue considered in *Eastman* was whether federal legislation could validly provide for the consideration by the High Court of evidence that goes to issues outside sections 75 and 76. It was generally agreed that 'the Constitution may not prevent the Parliament from legislating so as to give the Court power to receive fresh evidence in appeals where those appeals involve the exercise of federal jurisdiction'.<sup>40</sup> There was disagreement, however, in respect of whether the Constitution permits the Parliament to legislate so as to give the Court power to receive fresh evidence in appeals from the state Supreme Courts in matters of state jurisdiction. McHugh J described this as 'an open question', a point reiterated by Gummow J.<sup>41</sup> Gaudron J was clearly of the view that it was not. In *Mickelberg*, her Honour remarked that

a power in this Court to receive fresh evidence in an appeal from a State court exercising State judicial power and to determine the issues then raised by reference to that fresh evidence would be 'equivalent to investing this Court with original jurisdiction [over matters falling within] State judicial power'... Such a power is not conferred by Ch III of the Constitution for ss 75 and 76 constitute a complete and exhaustive statement of the original jurisdiction comprehended within the judicial power of the Commonwealth.<sup>42</sup>

### The resulting allocation of appellate jurisdiction

4.33 The result of these constitutional considerations is that the appellate jurisdiction of the High Court, of other federal courts and of state courts is significantly different.

?? The High Court may exercise original federal jurisdiction (sections 75 and 76), appellate federal jurisdiction (s 73), and appellate state jurisdiction (s 73), but not original state jurisdiction.

37 *ibid.* See also *Mickelberg v The Queen* (1989) 167 CLR 259, 267 (Mason CJ)

38 *Eastman v R* (2000) 172 ALR 39, 43 (Gleeson CJ).

39 *id.*, 52 (Gaudron J).

40 *ibid.*, referring to the decision of Mason J in *Mickelberg v The Queen* (1989) 167 CLR 259.

41 *id.*, 75 (McHugh J) 84–85 (Gummow J).

42 *Mickelberg v The Queen* (1989) 167 CLR 259, 298–299; citing *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265; *R v Maryborough Licensing Court; Ex parte Webster & Co Ltd* (1919) 27 CLR 249, 253.

- ?? Other federal courts may exercise original and appellate federal jurisdiction (sections 75, 76 and 77(i)), but neither original nor appellate state jurisdiction.<sup>43</sup>
- ?? State courts may exercise original and appellate federal jurisdiction (s 77(iii)), as well as original and appellate state jurisdiction.

4.34 This complex arrangement of the appellate system is a function of the distinction drawn in the Constitution between state and federal jurisdiction. Its constitutional basis sets the parameters within which reforms to the *Judiciary Act* and related legislation must be made. For example, prior to *Re Wakim*, the cross-vesting legislation purported to confer original state jurisdiction on the Federal Court, and such matters could be appealed to a Full Court of the Federal Court. However, if one applies the reasoning in *Collins v Charles Marshall* and *Gould v Brown* that the Constitution prohibits federal courts other than the High Court exercising appellate jurisdiction in state matters, such appeals were arguably unconstitutional. Future legislation that attempts to streamline the federal judicial system would be faced with the same constitutional hurdle.

## Avenues of appeal

### An outline of federal appellate structure

4.35 The High Court, as the final appellate court in Australia, is at the apex of both federal and state judicial systems. The High Court's appellate role is defined partly by s 73 of the Constitution and partly by federal legislation, particularly the *Judiciary Act*.

4.36 Under s 73 of the Constitution, the High Court's appellate jurisdiction is granted 'with such exceptions and subject to such regulations as the Parliament prescribes'. The *Judiciary Act*, in particular Parts V, XA and XB, provides the structure, practice and procedure of the High Court's appellate jurisdiction. However, as discussed below at paragraphs 4.41 and 4.174, s 73 of the Constitution places some constraints on the legislation that may be enacted by Parliament by the proviso that no exception or regulation of Parliament shall prevent the High Court from hearing and determining an appeal from a state Supreme Court that, at the establishment of the Commonwealth, could have been taken to the Privy Council.

4.37 The Federal Court and the Family Court may each be constituted by a Full Court, which provides the intermediate level of appeal for their respective jurisdictions. Appeals from decisions of single judges of those courts exercising original jurisdiction go to the relevant Full Court. Appeals from federal magistrates

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<sup>43</sup> See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, regarding the exercise of original state jurisdiction by federal courts.

go either to the Federal Court or the Family Court depending on the nature of the jurisdiction being exercised. The Chief Justice of the Federal or Family Court is given the discretion to allow such appeals to be heard by a single judge exercising the appellate jurisdiction of the Court.

4.38 Appeals within the federal appellate system also arise from state and territory courts, either from Supreme Courts, or directly from local and district courts, from which there are limited rights of appeal. Appeals from state courts to federal courts, known in this Discussion Paper as cross-jurisdictional appeals, are discussed later in this Chapter.

4.39 The wide variety of channels of appeal in the federal judicial system make it necessary to confine the present inquiry in a manner that focuses on the jurisdictional issues of greatest concern. Accordingly, this Chapter examines appellate jurisdiction with respect to *appeals to federal courts*. A principal reason for confining the discussion in this way relates to the Commonwealth Parliament's power to make laws with respect to federal courts created under s 71 of the Constitution. As discussed in Chapter 2, Parliament cannot regulate the structure and organisation of state courts, but must take those courts as it finds them when investing them with federal jurisdiction, including appellate jurisdiction. This is not to say that Parliament could not regulate some aspects of appellate federal jurisdiction exercised by state courts, but that the nature of that regulation is constrained by the constitutional limitation just mentioned.

4.40 The consequence of this choice is to *include* discussion of aspects of appellate jurisdiction in state matters, in so far as appeals may be brought to the High Court in these matters. The choice also *excludes* discussion of aspects of federal appellate jurisdiction, in so far as appeals may be brought to a state court of appeal in federal matters. This might happen, for example, where an ordinary contract claim between residents of different states is adjudicated at first instance in a state Supreme Court and is then taken on appeal to a Full Court or Court of Appeal in that state.<sup>44</sup>

### Appeals to the High Court

4.41 As noted above, the appellate jurisdiction of the High Court derives from s 73 of the Constitution, which provides directly for appeals to the High Court from certain courts, as well as providing authority for legislation to impose 'exceptions' or 'regulations' in respect of appeals. An example of an exception or regulation is the requirement that appeals be brought to the High Court with special leave of that Court. In 1984 the *Judiciary Act* was amended to make special leave the main avenue for appeals to the High Court. This is discussed in detail at paragraphs 4.167–4.216.

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44 See the discussion in Ch 2 on diversity jurisdiction under s 75(iv) of the Constitution.



4.42 The sources of appeal to the High Court are as follows.

- ?? From the High Court exercising original jurisdiction. Section 34 JA provides the High Court with jurisdiction to hear and determine appeals from all judgments of any Justice or Justices exercising the original jurisdiction of the High Court, whether in court or chambers. Leave is required, however, for an appeal from an interlocutory judgment (s 34(2) JA). Thus s 34 JA substantially repeats the language of s 73(i) of the Constitution, with the 'exception or regulation' that leave is required for an appeal from an interlocutory judgment. It may be noted that s 73 refers to appeals from 'judgments, decrees, orders, and sentences' whereas s 34 JA speaks only of appeals from 'judgments'. However, s 2 JA defines the latter terms to include a decree, order, or sentence.
- ?? From state courts. Section 35 JA provides that the High Court may hear and determine appeals from judgments of the Supreme Court of a state, whether in the exercise of federal jurisdiction or otherwise, but subject to special leave being granted. The section also provides that the High Court may hear and determine appeals from judgments of any other state court in the exercise of federal jurisdiction, but subject to special leave. Section 35, in similar fashion to s 34 JA referred to above, is derived from s 73 of the Constitution with the qualification that special leave is required. It is worth remarking that under s 35 the High Court's appellate jurisdiction extends to first appeals from state courts, including appeals from courts below the level of the Supreme Court. One issue to consider is that s 35 refers to appeals from judgments of state Supreme Courts without limiting appeals to matters in which these courts have exercised their appellate jurisdiction. This omission, which is no doubt a response to s 73 of the Constitution, appears to enable a party to apply to the High Court for special leave from a judgment of a single judge of a state Supreme Court exercising original jurisdiction. Such a situation runs counter to the accepted practice that appeals to the High Court emanate from intermediate appellate courts. In practice few direct appeals are likely to be made as the High Court, in determining special leave applications, takes into account the history of the matter, including whether an appeal has been made to an intermediate appellate court and the result of that appeal. It is highly unlikely that the High Court would grant special leave to appeal from a single judge of a Supreme Court where there had been no intermediate appeal. One issue is whether s 35 should be amended to make it clear that that appeals to the High Court can be brought only from state Full Courts or Courts of Appeal. As discussed in Chapter 7, similar arguments can be raised in relation to special leave to appeal from the Supreme Court of the Northern Territory under s 35AA JA. Any constitutional difficulty arising from this course

might be addressed in the same way s 20 FMA addresses the issue in relation to appeals from the Federal Magistrates Court.

- ?? From the Supreme Court of the Northern Territory. Under s 35AA JA, the High Court has appellate jurisdiction in relation to judgments of the Supreme Court of the Northern Territory, subject to the grant of special leave. There is no equivalent provision for the Supreme Court of the ACT. As explained in Chapter 7, the retention of s 35AA JA in its present form is something of a curiosity. Prior to the establishment of the Federal Court, the High Court generally heard all first appeals from the Supreme Courts of the Northern Territory and the ACT. In 1976, the Federal Court took over that jurisdiction, and it continues to hear appeals from the Supreme Court of the ACT.<sup>45</sup> However, since 1985, first appeals from the Supreme Court of the Northern Territory have generally gone to a Full Court of the Supreme Court.
- ?? From the Federal Court. Section 33 FCAA makes provision for appeals from the Federal Court to the High Court. Generally speaking, only appeals from a Full Court of the Federal Court may be made to the High Court, and such appeals are subject to the grant of special leave.<sup>46</sup>
- ?? From the Family Court. Section 95 FLA provides for two avenues of appeal from the Family Court to the High Court — by way of grant of special leave of the High Court<sup>47</sup> and upon the issuing of a certificate by the Full Court of the Family Court ‘that an important question of law or of public interest is involved’.<sup>48</sup> The granting of a certificate appears to confer a right of appeal that is not subject to the High Court’s special leave requirements and is discussed further at paragraphs 4.217–4.259.
- ?? From the Federal Magistrates Court in very limited circumstances. Section 20 FMA provides that an appeal may not be brought directly to the High Court from a judgment of the Federal Magistrates Court.<sup>49</sup> However, if this provision is inconsistent with s 73 of the Constitution then any such appeal may only be made by special leave of the High Court.<sup>50</sup> The latter provision was thought necessary because of a concern that prohibiting an appeal directly from the Federal Magistrates Court to the High Court may not be an ‘exception’ or ‘regulation’ of the right granted by s 73 of the Constitution to

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45 See s 24 FCAA. By s 24(6) FCAA, the Supreme Court of the Northern Territory is specifically exempted from the Federal Court’s jurisdiction to hear appeals from the Supreme Court of a territory.

46 s 33(2) FCAA.

47 s 95(a) FLA.

48 s 95 (b) FLA.

49 s 20(1) FMA. This has effect despite anything in s 95 FLA, s 104 *Child Support (Assessment) Act 1989* (Cth) and s 109 *Child Support (Registration and Collection) Act 1988* (Cth).

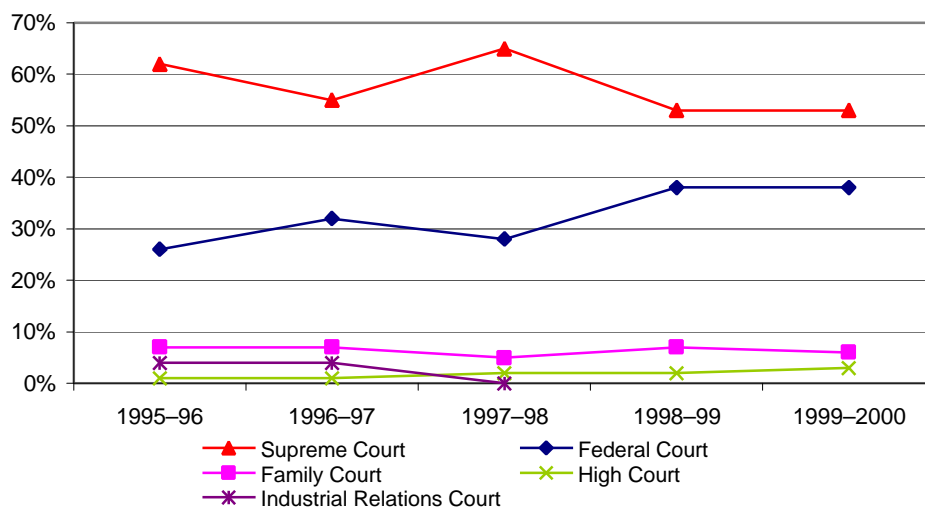
50 s 20(3) FMA.

bring an appeal to the High Court from ‘any other federal court’. Section 20(3) has thus been added as a precaution and would only operate following a judicial determination that s 20(1) was inconsistent with s 73 of the Constitution.

?? From the Supreme Court of Nauru. The *Nauru (High Court) Appeals Act 1976* (Cth) provides for appeals from the Supreme Court of Nauru to the High Court pursuant to a treaty concluded between Australia and the Republic of Nauru on 6 September 1976. This source of appeals is further discussed in paragraphs 4.67–4.78.

4.43 Figure 1 provides data on the sources of civil special leave applications filed in the High Court over the period 1995–2000. The figure indicates that the predominant sources of applications for special leave to appeal to the High Court are the state Supreme Courts and the Federal Court. It should be noted that some appeals may be brought to the High Court without special leave, such as those from a single judge of the High Court, appeals pursuant to a certificate granted under s 95(b) FLA, and certain appeals from the Supreme Court of Nauru.

**Figure 1: Sources of civil special leave applications filed in the High Court**



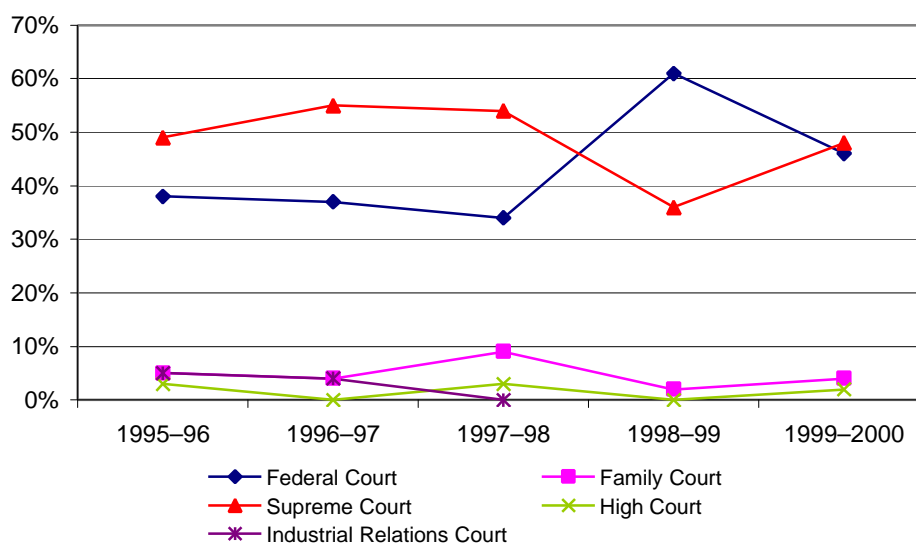
Source: High Court of Australia *Annual report*, various years.

Note: Figures for the Supreme Courts include the Northern Territory Supreme Court.

4.44 Figure 2 provides data on the sources of civil appeals filed in the High Court in the period 1995–2000. The predominant source of appeals is the state Supreme Courts, ahead of the Federal Court. However, the difference is not as great as with

civil special leave applications filed, and for the year 1998–99 the Federal Court was a greater source of civil appeal filings. It is possible that the considerable growth in the Federal Court’s original jurisdiction, as discussed in Chapter 2, will result in the Federal Court becoming a predominant source of High Court appeals in the future.

**Figure 2: Sources of civil appeals filed in the High Court**



Source: High Court of Australia *Annual report*, various years.

Note: Figures for the Supreme Courts include the Northern Territory Supreme Court.

**Question 4.3.** So far as the Constitution permits, should s 35 of the *Judiciary Act* be amended to make it clear that appeals to the High Court from state Supreme Courts can be brought only in relation to judgments given in the exercise of appellate jurisdiction or, alternatively in relation to judgments of a Full Court or Court of Appeal?

### Appeals to the Federal Court

4.45 Section 73 of the Constitution is concerned only with the appellate jurisdiction of the High Court and does not impose any direct constitutional limitations on the appellate jurisdiction of the Federal Court or any other federal court. Consequently, Parliament can regulate the Federal Court’s appellate jurisdiction as it wishes, provided that it does so in conformity with other constitutional requirements, such as the requirement that the appellate jurisdiction concern a ‘matter’, and that is federal in nature.

4.46 The Federal Court has a diverse appellate jurisdiction as provided by s 24 FCAA. This section gives the Federal Court jurisdiction to hear and determine the following matters.

- ?? Appeals from judgments of the Federal Court constituted by a single judge (s 24(1)(a)). However, there is no appeal to the Full Court of the Federal Court from a judgment of a single judge of the Federal Court who exercises appellate jurisdiction in relation to an appeal from the Federal Magistrates Court.<sup>51</sup>
  
- ?? Appeals from judgments of the Supreme Courts of the ACT and Norfolk Island (s 24(1)(b)). As described more fully in Chapter 7, prior to 1977 appeals from the Supreme Courts of these territories went directly to the High Court. Since 1977 the Federal Court has assumed the role of intermediate appellate court from these territories, presumably with a consequent reduction in the workload of the High Court.<sup>52</sup> Different arrangements are made for appeals from courts in the Northern Territory. Section 24(6) FCAA specifically exempts the Supreme Court of the Northern Territory from the Federal Court's appellate jurisdiction since first appeals now generally go to a Full Court of the Supreme Court of the Northern Territory.<sup>53</sup>
  
- ?? Appeals from a judgment of a state court (other than a Full Court of a state Supreme Court) exercising federal jurisdiction in such cases as are provided for by any Act (s 24(1)(c)). Major sources of these cross-jurisdictional appeals are federal intellectual property laws and disputes arising under the *Workplace Relations Act 1996* (Cth) (see paragraphs 4.57–4.66).
  
- ?? Appeals from judgments of the Federal Magistrates Court exercising original jurisdiction under any Commonwealth law other than the *Family Law Act 1975* (Cth), the *Child Support Assessment Act 1989* (Cth), the *Child Support (Registration and Collection) Act 1988* (Cth), or regulations under any of these Acts (the latter appeals go to the Family Court) (s 24(1)(d)). Normally, where an appeal is brought to the Federal Court from a judgment of the Federal Magistrates Court, the Federal Court's appellate jurisdiction will be exercised by a Full Court. However, in appropriate cases the Chief Justice of the Federal Court may direct that the appellate jurisdiction of the court be exercised by a single judge (s 25(1A) FCAA).

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51 s 24(1AAA) FCAA.

52 J Crawford *Australian courts of law* 3<sup>rd</sup> ed Oxford University Press Melbourne 1993, 155.

53 *Supreme Court Act 1979* (NT) s 51.

4.47 Information provided to the Commission by the Federal Court during the course of the Commission's inquiry into the federal civil justice system indicates that the predominant source of appeals is from decisions of single judges of the Federal Court.<sup>54</sup> Between 1995–96 and 1997–98, 83–87% of appeals to the Federal Court came from a single judge of that Court, while 11–13% came from state and territory Supreme Courts.

4.48 Appeals cannot usually be taken directly to the High Court from a judgment of the Federal Court constituted by a single judge (s 33 FCAA). However, an exception to this rule is made in respect of decisions of a single judge on appeal from the Federal Magistrates Court. This raises the prospect of any second appeal in matters originating in the Federal Magistrates Court being taken directly to the High Court. The implications of this for the workload of the High Court have yet to be determined and will depend on the way in which the Chief Justice of the Federal Court exercises his or her discretion under s 25(1A) FCAA. However, it is a development that might be regarded with some concern, especially in view of the likelihood of such appeals being brought by litigants in person.

4.49 Under s 25 FCAA, the appellate jurisdiction of the Federal Court must be exercised by a Full Court except in relation to appeals from a court of summary jurisdiction (including the Federal Magistrates Court). A Full Court is usually constituted by three or more judges sitting together.<sup>55</sup> If the appeal is from a court of summary jurisdiction, the Federal Court's appellate jurisdiction may be exercised by one judge or a Full Court.<sup>56</sup>

4.50 Applications for leave to appeal or for an extension of time within which to institute an appeal may be determined by a single judge or by a Full Court.<sup>57</sup>

### Appeals to the Family Court

4.51 Section 94 FLA provides that an appeal lies to a Full Court of the Family Court from

?? a decree of the Family Court, constituted otherwise than as a Full Court,<sup>58</sup> exercising original or appellate jurisdiction

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54 Federal Court *Correspondence* 8 October 1998.

55 s 14(2), (3) FCAA.

56 s 25(5) FCAA.

57 s 25 FCAA.

58 'Full Court' means three or more judges of the Family Court sitting together, where a majority of those judges are members of the Appeal Division: s 4(1) FLA.

- ?? a decree of a Family Court of a state (currently only the Family Court of Western Australia) or a Supreme Court of a state or territory constituted by a single judge exercising original or appellate jurisdiction under the *Family Law Act*,<sup>59</sup> or
- ?? a decree or decision of a judge exercising original or appellate jurisdiction under the *Family Law Act* rejecting an application that he or she disqualify himself or herself from further hearing the matter.

4.52 In relation to appeals from the Federal Magistrates Court, s 94AAA FLA provides that an appeal lies to the Family Court from

- ?? a decree of the Federal Magistrates Court exercising original jurisdiction under the *Family Law Act*, or
- ?? a decree or decision of a Federal Magistrate exercising original jurisdiction under the *Family Law Act* rejecting an application to disqualify himself or herself from further hearing a matter.

4.53 An appeal under s 94AAA must be heard by a Full Court of the Family Court unless the Chief Justice considers that it is appropriate for the appeal to be heard by a single judge.<sup>60</sup>

4.54 The *Child Support (Assessment) Act 1989* (Cth) (CSAA) provides that an appeal may be made to the Family Court, with leave of the Family Court, from

- ?? a decree of the Federal Magistrates Court exercising original jurisdiction under the CSAA, or
- ?? a decree or decision of a federal magistrate exercising original jurisdiction under the CSAA rejecting an application to disqualify himself or herself from further hearing a matter.<sup>61</sup>

4.55 There are similar provisions in s 107A(1) of the *Child Support (Registration and Collection) Act 1988* (Cth).

4.56 Section 96 FLA provides for an appeal from a court of summary jurisdiction, exercising jurisdiction under the *Family Law Act*, to the Family Court or to the Supreme Court of that state or territory.<sup>62</sup>

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59 Only the Western Australian and Northern Territory Supreme Courts retain this jurisdiction. On 27 May 1976 the Governor General issued a proclamation under s 96(3) FLA ending appeals to the Supreme Courts of all jurisdictions other than Western Australia and the Northern Territory.

60 s 94AAA(3) FLA.

61 s 102A(1) CSAA.

62 The Governor-General issued a proclamation on 27 May 1976 ending appeals to the Supreme Courts other than Western Australia and the Northern Territory. Appeals from Magistrates Courts in other states and the ACT go to the Family Court.

**Question 4.4.** Where the Constitution confers a right of appeal (as s 73 does in relation to the High Court), should legislation restate that right (as it does in s 34 of the *Judiciary Act*) or should it confine itself to specifying ‘exceptions’ or ‘regulations’ of that right (as it does in s 33 of the *Federal Court of Australia Act*)? If legislation does restate the right, should the statutory language conform to that used in the Constitution?

## Cross-jurisdictional appeals

### Appeals from state courts to federal courts

4.57 This section of the paper concerns some issues arising from appeals from state courts to federal courts in the exercise of federal jurisdiction.

4.58 Section 24(1)(c) FCAA provides that the Federal Court may hear and determine appeals from state courts exercising federal jurisdiction in such cases as are provided by any other Act, other than appeals from a Full Court of a state Supreme Court. The section thus contemplates that decisions in certain federal matters will be made at trial level in state courts but that appeals from those decisions might be brought to the Federal Court. The principal rationale for this avenue of cross-jurisdictional appeal is to achieve uniform interpretation of federal law.

4.59 A major example of the use of cross-jurisdictional appeals is in relation to intellectual property law.<sup>63</sup> Most of Australia’s intellectual property law is derived from Parliament’s power under s 51(xviii) of the Constitution to make laws with respect to copyrights, patents, designs and trademarks.

4.60 Prior to 1976 much of the jurisdiction in those matters was conferred on the High Court in its original jurisdiction. In 1976 jurisdiction in relation to designs, trademarks, and patents was conferred on state and territory Supreme Courts and the High Court’s original jurisdiction in those matters was abolished. This meant that no federal court could exercise original jurisdiction over intellectual property matters, unless such matters were associated with matters otherwise in the court’s jurisdiction. However, an attempt was made to preserve uniformity in the interpretation and development of federal intellectual property laws by providing that appeals under the various Acts could be brought to the Federal Court, or to the High Court with leave, but that no other appeals could be instituted. As a result, first instance decisions in intellectual property matters were made exclusively in state courts, while appeals were determined exclusively in federal courts.

<sup>63</sup> The following discussion is based on the discussion in B Opeskin ‘Federal jurisdiction in Australian Courts: Policies and prospects’ (1995) 46 *South Carolina Law Review* 765, 777–778.



4.61 In 1987 these provisions were amended to confer concurrent original jurisdiction on the Federal Court to hear and determine matters arising under the federal intellectual property Acts, but the provisions concerning the exclusive appellate jurisdiction of federal courts have remained unchanged.

4.62 Another significant area where the Federal Court hears appeals from state and territory courts is under the *Workplace Relations Act 1996* (Cth). District, County, Local or Magistrates Courts are given certain jurisdiction under the Act in relation to enforcement and remedies<sup>64</sup> and contravention of awards and orders.<sup>65</sup> However, pursuant to s 422 of the Act, appeals lie to the Federal Court from a judgment of a state or territory court in any matter arising under the Act.<sup>66</sup>

4.63 The major argument for the use of cross-jurisdictional appeals under s 24(1)(c) FCAA is that it contributes to the uniform interpretation of federal law. Uniformity is desirable because it means that the outcome of each case is not affected by the venue chosen for the trial of the action. This arises because trial judges in state courts exercising federal jurisdiction under the relevant Acts will be bound by appellate decisions of the Federal Court through the doctrine of precedent. However, as discussed in Chapter 2, it is arguable that reasonable consistency can be achieved through judicial comity between state courts, without invoking the supervising jurisdiction of the Federal Court. In any case, the constitution of a Full Court of the Federal Court from a rotating pool of trial judges does not guarantee consistency in judicial decision-making within the Federal Court itself (see paragraphs 4.260–4.265).

4.64 There are some concerns with the use of jurisdiction conferred by s 24(1)(c). One concern is that it may lead to a perception that state courts of appeal lack the expertise or capacity to hear such matters. The use of the power may undermine the confidence and status of state courts internally and also within the community. It may be argued that, because these courts have been assessed as having sufficient expertise to hear these matters at trial, it ought to follow that they have sufficient expertise to hear any ensuing appeals from within their own court hierarchy. There is considerable appellate expertise within state courts of appeal and many judges will have had experience in dealing with federal matters. In New South Wales and Victoria, courts of appeal are comprised solely of permanent judges of appeal.

4.65 It might also be argued that state courts of appeal are able to consider, and often must consider, legal developments in other appellate courts and that this process contributes to a uniform interpretation of federal law. In addition, the High Court has a primary role in ensuring that there is uniformity in legal development, although the High Court's capacity to achieve that objective may itself be limited

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<sup>64</sup> s 170NE.

<sup>65</sup> s 177A.

<sup>66</sup> Also see s 4 for definition of 'the Court'.

by the small number of appeals it determines each year. Finally, it might be argued that if parties choose a particular court for the trial of their action, that choice ought to be respected at the level of intermediate appeal.

4.66 Three possible arrangements for matters presently subject to cross-jurisdictional appeal may be derived from the options canvassed above.

- ?? First, the present situation may be maintained, with original federal jurisdiction being exercised by a state court and appellate federal jurisdiction being exercised by the Federal Court.
- ?? Second, the cross-jurisdictional appeal might be eliminated at the level of intermediate appeal, with both original and appellate federal jurisdiction being exercised by a state court.
- ?? Third, the cross-jurisdictional appeal might be eliminated by removing the original federal jurisdiction of state courts in such matters — both the trial and the appeal would then be heard by the Federal Court.

**Question 4.5.** Should the Federal Court continue to act as the intermediate appellate court from decisions of state courts exercising federal jurisdiction in specific fields such as federal intellectual property law and labour law? If not, what court should hear intermediate appeals?

### Appeals from the Supreme Court of Nauru to the High Court

4.67 A very different situation of cross-jurisdictional appeals arises in relation to appeals to the High Court from the Supreme Court of Nauru. The contrast with the previous situation is stark — these appeals cross not merely juristic boundaries within Australia, but international boundaries.

4.68 The Republic of Nauru was formerly a United Nations trust territory under the joint administration of Australia, New Zealand and the United Kingdom, until it achieved independence in 1968. In 1976 a treaty was concluded between Australia and Nauru to provide channels of appeal to the High Court of Australia in certain circumstances. As is apparent from the recitals to the treaty, the agreement sought to continue arrangements that had been in place prior to Nauru's independence. The *Nauru (High Court Appeals) Act 1976* (Cth) gives effect to the treaty, which is appended in a Schedule to the Act. Section 5 of the Act provides that 'Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie'.

4.69 Article 1 of the treaty provides as follows.

Subject to Article 2 of this Agreement, appeals are to lie to the High Court of Australia from the Supreme Court of Nauru in the following cases:

A. In respect of the exercise by the Supreme Court of Nauru of its original jurisdiction-

In criminal cases — as of right, by a convicted person, against conviction or sentence.

In civil cases — as of right, against any final judgment, decree or order; and with the leave of the trial judge or the High Court of Australia, against any other judgment, decree or order.

B. In respect of the exercise by the Supreme Court of Nauru of its appellate jurisdiction-

In both criminal and civil cases, with the leave of the Court.

4.70 Article 2 provides that an appeal is not to lie to the High Court of Australia from the Supreme Court of Nauru in stated circumstances. However, outside these circumstances, the treaty provides a unique example of a cross-jurisdictional appeal. In civil cases, the treaty permits a first appeal to the High Court as of right from the Supreme Court of Nauru exercising original jurisdiction. It also permits a second appeal ‘by leave’ of the High Court from the Supreme Court of Nauru exercising appellate jurisdiction.

4.71 The terms of the treaty raise some interesting issues of interpretation and policy. Article 1B refers to obtaining the ‘leave’ of the High Court and not ‘special leave’. There is thus a question as to whether the requirements of s 35A JA, which refer to the ‘criteria for granting special leave’, would have direct application to the High Court’s consideration of leave to appeal under this Act or whether the High Court would adopt other criteria to determine such applications.

4.72 Another issue is why under Article 1A it is possible to appeal to the High Court as of right from the exercise of original jurisdiction by the Supreme Court of Nauru, when the latter Court may itself have appellate jurisdiction. Further, it is open not only to the High Court, but also to the trial judge to grant leave to appeal to the High Court in relation to interlocutory civil judgments in the original jurisdiction of the Supreme Court of Nauru. This gives a trial judge of a foreign court potentially unparalleled powers to determine the appellate workload of the High Court, at least in interlocutory matters, although in practice this power has not been exercised.

4.73 A further issue is whether the legislation may be unconstitutional on the ground that the High Court’s appellate jurisdiction is exclusively derived from s 73 of the Constitution. The High Court has not directly considered the issue of the validity of the *Nauru (High Court Appeals) Act*. In two appeals arising under the legislation, both of which concerned criminal matters, the High Court did not refer to the issue of validity and thus might be said to have implicitly accepted the basis

of the Court's jurisdiction.<sup>67</sup> This is presumably on the basis that a court must satisfy itself that it has jurisdiction before adjudicating the substance of a matter.

4.74 However, doubts about the Act's validity have arisen more recently from comments made in *Gould v Brown* by Brennan CJ, McHugh J and Toohey J. While McHugh J did not refer specifically to any constitutional issues arising in relation to the Nauru legislation he said

[j]ust as ss 75 and 76 were intended to be a complete statement of the heads of original jurisdiction, s 73 was intended to be an exhaustive statement of the appellate jurisdiction of the High Court. In the first case reported in the Commonwealth Law reports, this court said that the Parliament of the Commonwealth cannot create appellate jurisdiction for the High Court in addition to that provided by s 73 itself. Section 73 was also intended as an exhaustive statement of the appellate jurisdiction of federal courts in respect of State jurisdiction...these limitations upon the Parliament of the Commonwealth to grant original and appellate jurisdiction to the High Court and the other federal courts powerfully support the negative implication that no other legislature in the federation, with or without the consent of the Parliament of the Commonwealth, can invest the High Court or the other federal courts with jurisdiction.<sup>68</sup>

4.75 Brennan CJ and Toohey J in *Gould v Brown*, although not referring to the validity of the Nauru legislation also said

[the High Court's] appellate and original jurisdiction is vested in large measure by the Constitution itself. As the creature of the Constitution, it has the jurisdiction vested by the Constitution, subject to the regulations affecting its appellate jurisdiction under s 73...This court's [High Court] appellate jurisdiction cannot be extended by the parliament except under the territories power.<sup>69</sup>

4.76 This statement is particularly significant because Brennan CJ and Toohey J were prepared to uphold the validity of legislation conferring state jurisdiction on federal courts other than the High Court. Although not strictly necessary for the decision in the case, their acceptance of the exclusivity of the High Court's appellate jurisdiction under s 73 of the Constitution is telling.

4.77 There is also some express judicial authority for the Act's validity. Kirby J in *Gould v Brown*<sup>70</sup> rejected the argument that a federal court may only exercise jurisdiction as set out in Ch III, citing the Nauru legislation as an example of additional jurisdiction having been conferred on the High Court and exercised by it. In a similar vein, in his dissenting judgment in *Re Wakim; Ex parte McNally*,<sup>71</sup>

67 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627; *Amoe v Director of Public Prosecutions (Nauru)* (1991) 103 ALR 595.

68 (1998) 151 ALR 395, 440 (McHugh J) citing *Hannah v Dalgarno* (1903) 1 CLR 1, 10 and *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529.

69 (1998) 151 ALR 395, 409.

70 id, 497.

71 (1999) 198 CLR 511.

Kirby J argued that the practice of the Commonwealth Parliament (including the example of the *Nauru Act*) and the conduct of the High Court (for example, accepting jurisdiction under s 30B JA as a trial court for the ACT<sup>72</sup>)

contradict any rigid view about the conferral upon federal courts (indeed upon this Court) of jurisdiction and functions standing outside those expressly stated within Ch III of the Constitution.<sup>73</sup>

4.78 The Commission has no information available to it to suggest that cross-jurisdictional appeals to the High Court from Nauru pose any practical difficulties for the Court, although the Commission welcomes any comment on this issue. The jurisdiction has had very little impact on the High Court's workload because, as noted above, there have been only two cases reported as arising under this legislation. However, as a matter of principle, the existence of such appeals is clearly anomalous, if not unconstitutional. Any change to the present arrangements could be effected in one of two ways. Under Article 6 of the treaty, Australia could terminate the treaty on 90 days written notice. Alternatively, and less desirably, Parliament could repeal the Act without terminating the treaty. Such a course would be effective in domestic law but place Australia in breach of its international obligations to Nauru.<sup>74</sup>

**Question 4.6.** Should the treaty between Australia and Nauru providing for certain appeals from the Supreme Court of Nauru to the High Court be terminated and the *Nauru (High Court Appeals) Act 1976* (Cth) be repealed?

### Access to a first appeal

4.79 This part of the Chapter concerns the question whether access to a first appeal in federal proceedings should be by right or by leave of the court and, if the latter, according to what criteria. The aim of this part is to explore whether the current approach of generally allowing appeals from the first judicial determination as of right is the most appropriate and effective method for appellate review or whether an alternative, based on greater use of discretionary leave requirements, should be considered. The part examines the current Australian law and practice with particular focus on the procedures in the High Court, the Federal Court and Family Court.

<sup>72</sup> Inserted by the *Judiciary Act 1927* (Cth) s 4 and see *R v Porter* (1933) 55 CLR 182.

<sup>73</sup> (1999) 198 CLR 511, 608. Also see Lee J of the Federal Court in *West Australian Psychiatric Nurses' Association (Union of Workers) v Australian Nursing Federation* (1991) 30 FCR 120,131, who said that the Commonwealth Parliament 'may legislate to repose in the High Court an appellate jurisdiction not provided under Ch III of the Constitution'.

<sup>74</sup> eg, see *Polites v Commonwealth* (1945) 70 CLR 60, where the High Court held that the Governor-General could make regulations about the military service of any person in Australia, including aliens, notwithstanding any contrary rule of international law.

## Current Australian law and practice

4.80 Leaving aside appeals on interlocutory matters, the Australian judicial system generally permits one appeal as of right and one further appeal by leave of the court. Typically, a first appeal is taken to an intermediate appellate court comprised of three judges. A second appeal may then be taken, if leave is granted, to the High Court comprised of five or seven judges.

### *High Court*

4.81 The position of the High Court is unique because of its role as the final court of appeal for Australia. The High Court's appellate jurisdiction may arise in two ways. The most common situation is one in which the High Court provides a second level of appeal from a decision of an intermediate appellate court. Where the High Court is the court of final appeal from a decision of an intermediate appellate court, the appeal can generally only be brought with special leave of the High Court, subject to one exception, which is discussed fully below.<sup>75</sup>

4.82 Far less common is the situation relevant to the present discussion, in which the High Court provides the first and only appeal. One circumstance in which this arises is where an appeal is taken from a decision of a single judge of the High Court exercising original jurisdiction (see paragraphs 4.27 and 4.43). As indicated in Figure 2, such appeals are extremely uncommon — accounting for between 0-3% of the High Court's appellate workload in civil matters from 1995-96 to 1999-2000. Such matters are more likely to come before a Full Court of the High Court by way of a case stated by a single justice pursuant to s 18 JA (see Chapter 3). As is typical of the jurisdictions described above, these first appeals are available as of right, except for interlocutory matters, which require leave.<sup>76</sup> Most matters that currently come before a single justice are interlocutory matters, such as an order nisi for a prerogative writ. As such, appeals can be heard by the Full Court only with the leave of the Court. This part of the Chapter considers whether appeals under s 34 JA should continue to be as of right.

4.83 The other situation in which the High Court provides the first and only appeal is even more rare. As discussed in paragraphs 4.67-4.78, under a treaty entered into between Australia and Nauru in 1976, an appeal may be brought as of right to the High Court from a judgment of the Supreme Court of Nauru exercising its original jurisdiction in any civil case in which final judgment has been given. In other cases (such as appeals from interlocutory orders), the appeal must be with the leave of the trial judge or the High Court. In practice this jurisdiction has had a minimal impact on the workload of the Court. Whether such a jurisdiction should be retained in principle is discussed further above.

<sup>75</sup> s 35(2) HCAA. The exception is s 95(b) FLA.

<sup>76</sup> ss 34(1), (2) HCAA.

**Federal Court**

4.84 An appeal to a Full Court of the Federal Court is generally available as of right. In certain limited circumstances, however, leave is required. For example, an appeal cannot be brought from an interlocutory judgment, except with the Court's leave.<sup>77</sup> In addition, even where the appeal to the Federal Court is generally as of right, if the appellant fails to file the notice of appeal within the time prescribed by the rules, the appellant must seek leave to appeal.

4.85 In those circumstances where leave is required, applications for leave to appeal may be determined by a single judge or by a Full Court.<sup>78</sup> While the *Federal Court of Australia Act* gives the Court a discretion to grant leave,<sup>79</sup> the Court has developed principles to guide the exercise of that discretion. Those principles are further discussed at paragraphs 4.137–4.138.

**Family Court**

4.86 Appeals to the Full Court of the Family Court from final judgments are as of right, but appeals from interlocutory judgments, apart from those made in relation to a 'child welfare matter' require the leave of the Court.<sup>80</sup> In addition, the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) provide that an appeal to a Full Court from a decision of a judge of the Family Court, pursuant to this legislation, shall only be by leave of the Full Court.<sup>81</sup>

4.87 In those circumstances where leave is required, an application for leave to appeal must be made in accordance with the Rules of the Court,<sup>82</sup> and must be determined by a Full Court of the Family Court. The Court may, however, make rules enabling applications for leave to appeal to be determined without an oral hearing.<sup>83</sup> Once leave is granted, the procedure for appeals is identical to that for appeals as of right under s 94 FLA.

4.88 In at least one respect, rights to appeal to the Family Court are broader than those with respect to the Federal Court because appeals in relation to child welfare matters do not require leave, even if they would be considered interlocutory in

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77 s 24(1A) FCAA.

78 s 25(2) FCAA.

79 s 24(1A) FCAA.

80 s 94AA, s 60 FLA (defining 'child welfare matter').

81 *Child Support (Registration and Collection) Act 1988* (Cth) s 107A, *Child Support (Assessment) Act 1989* (Cth) s 102A.

82 O 32A FLR.

83 s 94AA(3) FLA. See also O 32A r 6 FLR.

nature.<sup>84</sup> This difference is significant given that residence or contact issues are raised in 40% of notices of appeal.<sup>85</sup> In 1998–99, the Family Court received 43 applications for leave to appeal, compared with 291 appeal applications,<sup>86</sup> reflecting the fact that most appeals are by right.

### Policy considerations in relation to first appeals

4.89 The availability of some mechanism of review is central to public confidence in the justice system because it enables parties to have errors or injustices arising from a judicial decision corrected. A just legal system clearly requires a fair and effective appellate process. However, while the right to an appeal from an initial judicial determination is regarded as a traditional component of the Australian legal system, it is not entrenched. Jurisdiction to hear appeals is conferred by statute. Even s 73 of the Constitution, which provides for channels of appeal to the High Court in specified cases, is qualified by the power of Parliament to prescribe ‘exceptions’ and ‘regulations’. This power has been interpreted broadly so that arguably s 73 offers only a limited constitutional guarantee of an appeal.<sup>87</sup>

4.90 Regulating access to intermediate appellate courts raises issues of principle from the perspectives of the individual litigant, the administration of justice and the broader community. For litigants, appeals are the only effective mechanism for reviewing their cases and correcting errors made at trial. However, appeals are costly for appellants and respondents. Lodging an appeal almost invariably lengthens litigation, delays final determination, and increases costs. Generally, it is unfair on one or both parties to put them to that expense unless the circumstances warrant it. As Lord Donaldson is reported to have said, ‘it is no kindness to allow an appeal to go forward which will quite clearly fail’.<sup>88</sup>

4.91 There are also community interests in the fair and effective administration of justice. The proper correction of errors through the appellate process serves a public purpose as well as a private one by promoting public confidence in the justice system.<sup>89</sup> Appeals are also vital in developing a rational and coherent system of law, which helps members of the community to plan their activities.

84 A child welfare matter means a matter relating to the person or persons with whom a child is to live, contact between a child and another person or persons, or any other aspect of parental responsibility for a child: s 94AA FLA.

85 <[www.familycourt.gov.au/court/html/statappeals1.html](http://www.familycourt.gov.au/court/html/statappeals1.html)> (16 November 2000).

86 Family Court *Annual report 1998–99*, 46, 47, tables 3.4, 3.5. In 1999–00, 301 appeals were filed in the Family Court but data on the number of applications for leave to appeal are not available: See Family Court *Annual report 1999–2000*, 27.

87 In *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, the High Court upheld the validity of legislation imposing a requirement of special leave to appeal to the High Court as a valid ‘regulation’ within s 73.

88 Woolf final report 155.

89 Lord Oliver ‘The appeal process’ (1992) 2 *Journal of Judicial Administration* 63, 68.



However, an effective appellate system requires the outlay of considerable public expenditure including judicial and court staff salaries, buildings, other court infrastructure and administrative services.

4.92 Barrow has suggested that ‘where demand on the appellate system is modest and resources are sufficient, an appeal of right is a preferred alternative to the discretionary appeal’.<sup>90</sup> Yet few jurisdictions, including those of the Federal Court or the Family Court, are likely to have modest demands on their appellate processes and sufficient resources to justify the unquestioned assumption that first appeals must be as of right.

4.93 Beaumont J has identified a central concern in this field as balancing the need for ‘individualised justice’<sup>91</sup> for each litigant with the need to control the number of appeals brought.

The modern tendency to provide, at the trial level, what Atiyah describes as ‘individualised justice’, has been seen also in the appellate courts. In this country, and elsewhere, both intermediate and final appellate courts have taken a broad view of their powers to reverse findings of fact made at first instance and also to order a new trial if insufficient reasons are given by the trial judge. At least one appeal is available by statute as of right in most cases where a final order has been made. The question thus arises whether we have been successful in controlling the number of appeals that should properly be brought.<sup>92</sup>

4.94 Responses to whether a leave requirement is preferable to having first appeals as of right are likely to vary according to the subject matter of the appeal and the courts involved. It should not be assumed that exactly the same arguments apply in relation to the High Court, the Federal Court and the Family Court. For example, the High Court is the court of final appeal for Australia in both matters of federal and state jurisdiction. Although s 34 JA currently provides for appeals as of right from judgments of a single justice of that Court exercising original jurisdiction, it is arguable that access to a Full Court of the High Court from a decision of a single justice should be by leave, although the criteria for leave might require adaptation in such a case. This would recognise the desirability of immunising the Court from determining matters that do not raise legal questions of public importance, even in relation to first appeals.

4.95 The Federal Court and the Family Court also have significant differences in the types of cases they hear and this too may impact on the nature of access to a first appeal. This is especially true of the appellate jurisdiction of the Family Court.

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90 B Barrow ‘The discretionary appeal: A cost effective tool of appellate justice’ (1988) 11 *George Mason University Law Review* 31, 40.

91 For a discussion of this term see P Atiyah *From principles to pragmatism* Clarendon Press Oxford 1978.

92 B Beaumont ‘Legal change and the courts’ *Keynote address 47th Annual Australasian Law Teachers’ Association Conference* July 1992 Brisbane.

In the context of family law in Australia, the limitations on the appeal process in the overall judicial system are perhaps more restricting than in some other jurisdictions. The wide discretionary power of the Family Court in dealing with the vast majority of matters which arise before it is well known. The approach of the Family Law Act 1975 in specifying lists of factors to be taken into account when making decisions, without dictating the weight or priority to be given to those matters, leaves the primary decision makers a particularly wide discretion.<sup>93</sup>

4.96 This wide discretion may suggest that access to appeals in the Family Court should be more restricted because the discretionary nature of the original determination may encourage a greater number of unmeritorious appeals than in other civil litigation. The breadth of the trial judge's discretion may also require a stricter standard of review on appeal.

### *Arguments for a rights based system*

4.97 Crawford argues that

the principal function of a first appeal is to correct errors that can be shown to have been made by the trial court. The notion — very widely accepted — that every litigant is entitled to an appeal is based on the power of the first appeal court to scrutinize the trial decision as far as possible on its merits, whether or not the appeal is formally by way of rehearing.<sup>94</sup>

4.98 The notion of a right to appeal is attractive because it suggests that every litigant has the potential to seek review of his or her case. It is consistent with concepts of individualised justice and the rights of individuals to challenge judicial determinations that adversely affect them, with as few limitations on the exercise of that right as is possible. It is an open question whether access to a first appeal by leave rather than by right would satisfy a demand for at least one review of a judicial determination.

4.99 Australia's international obligations, including the International Covenant on Civil and Political Rights 1966 (ICCPR) purport to establish a right of appeal only for criminal cases, and such rights must be exercised 'according to law'.<sup>95</sup>

4.100 In *Young v Registrar, Court of Appeal (No 3)*,<sup>96</sup> the New South Wales Court of Appeal had to consider the effect of the ICCPR in relation to an applicant convicted of contempt of court for defying a child custody order of the Supreme Court of New South Wales. The applicant sought to be discharged from prison, pursuant to Pt 55, r 14 of the Supreme Court Rules 1970, after his application for

93 Family Law Council *Family Law Appeals and Review: An evaluation of the appeal and review of family law decisions* Commonwealth of Australia Canberra 1996, 3.

94 J Crawford *Australian courts of law* 3<sup>rd</sup> ed Oxford University Press Melbourne 1993, 198.

95 Australian Treaty Series (1980) No 23. Art 14(5) states: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.

96 (1993) 32 NSWLR 262.

special leave to appeal to the High Court was dismissed. That rule stated that '[w]here a contemnor is committed to prison for a term, the Court may order discharge before the expiry of the term'.

4.101 The applicant argued that he had been deprived of the right to have his conviction and sentence reviewed by a higher tribunal according to law, contrary to Art 14.5 of the ICCPR, and that this failure should be considered by the Court in exercising its discretion to release a contemnor under Pt 55, r 14. The applicant claimed a denial of a right of review because the special leave proceeding before the High Court did not review the substance of the conviction and sentence. The Court of Appeal rejected the view that the ICCPR was part of domestic Australian law, but two members of the Court were prepared to regard the ICCPR as relevant to the exercise of the discretion.

4.102 Handley JA held that the special leave procedure could satisfy the requirement of higher review because the applicant had the 'initial safeguard of a trial before three of the senior judges of the State' and 'the ultimate safeguard of the right to apply for special leave' to the High Court.<sup>97</sup> Powell JA found it unnecessary to consider the argument about the ICCPR but said he remained to be persuaded that the High Court's procedures failed to provide a review by a higher tribunal according to law.<sup>98</sup> Kirby J, dissenting on this point, said that special leave to the High Court did not constitute 'sufficient compliance' with the ICCPR.<sup>99</sup>

4.103 Kirby J's suggestion that the present requirement for special leave to appeal to the High Court may not meet Australia's international obligations provides one argument in favour of retaining a rights-based system of appeals. However, it should be noted that the situation that arose in *Young* was highly unusual. An appeal to the High Court provided the first and only possible opportunity of review because the 'trial' decision was given by a bench of three judges of the New South Wales Court of Appeal exercising original state jurisdiction.

4.104 The response to the policy issue as to whether discretionary leave satisfies the demands of individualised justice may depend on the criteria used to determine leave applications. For example, criteria that are not directed to the individual merits of the appeal are perhaps unlikely to satisfy demands for individualised justice. On such reasoning, the criteria for special leave to appeal to the High Court under s 35A JA would not satisfy the demand because those criteria focus more on the public importance of the particular case rather than its individual substantive merits. However, leave criteria developed for intermediate appellate courts, which are more directed to the merit of individual cases might be sufficient to meet the demands of individualised justice. The criteria that ought to be developed for intermediate appellate courts are discussed further in paragraphs 4.135–4.143.

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97 id, 290.

98 id, 293.

99 id, 280.

4.105 Concerns have also been expressed about the widespread use of leave requirements. At the time of the introduction of the special leave procedure in the High Court in 1984, the Law Council of Australia expressed concerns that it was 'inappropriate' to give the High Court a broad power to decide which cases it hears.<sup>100</sup> The Law Council favoured the retention of appeals as of right, subject to a range of additional restrictions on the ambit of the appeal right.<sup>101</sup>

4.106 Ian Callinan QC in 1994 (as he then was) drew unfavourable parallels between the special leave procedure and the discretion to grant *certiorari* exercised by the United States Supreme Court. Mr Callinan commented that by the time special leave was introduced in the High Court, the United States equivalent of special leave had become a source of dissatisfaction.

There, commentators had criticised the idiosyncratic tendencies of various judges in exercising the jurisdiction. Stories abounded, unable to be confirmed, of judges acting the role of advocates to urge the hearing of cases raising issues which, in truth, particular judges had prejudged, and upon which they wished the settlement or resolution of the law in terms of that prejudgment.<sup>102</sup>

4.107 Mr Callinan proposed that rights of appeal should be restored, subject to financial and other criteria, enabling the Court to hear more appeals instead of hearing special leave applications. He concluded that Parliament ought to legislate for the Court's jurisdiction in express terms.

A Court that reserves the right to pick and choose upon wholly unpredictable bases those settled arrangements which it would, and others that it would not disturb, ... to define its own jurisdiction exclusively, to intervene because in its assessment Parliament should but has failed to do so, and a Court that says it knows best how the community perceives issues is, on any view, a body of enormous, indeed unparalleled power in society.<sup>103</sup>

4.108 The above comments were made in relation to the High Court but they also suggest that if a leave system were adopted for intermediate appellate courts the criteria for determining applications would need to be structured to avoid the concerns adverted to above. The issue of how to structure a discretion to grant leave is discussed further at paragraphs 4.135–4.143.

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<sup>100</sup> See for example, S O'Bryan 'High Court appeals' (1984) 19(4) *Australian Law News* 11.

<sup>101</sup> *ibid.* The Law Council envisaged an appeal as of right in civil appeals based on three circumstances: (i) an increased monetary limit; (ii) a division of opinion in the court below; and (iii) on the granting of a certificate of the court below. The Law Council also suggested an increase in the number of High Court judges from seven to nine should its proposals not result in a sufficient decrease in the Court's workload.

<sup>102</sup> I Callinan 'An over-mighty court' in *Upholding the Australian Constitution* Proceedings of the Fourth Conference of the Samuel Griffith Society 1994, 81, 92–3.

<sup>103</sup> *id.*, 113.

4.109 A further concern with a system based on leave is that the requirement to consider applications for leave will itself impose a considerable burden on the workload of a court, leaving courts with less time and resources to hear appeals. Consequently, the suggested cost and time savings arising from a leave system will be reduced by the effort required to operate such a system. How these issues balance out will depend very much on the procedures adopted for assessing the leave applications. Leave requirements might also encourage some potential civil appellants to make an application for leave because the threshold for success is lower than on an appeal and success may improve their negotiating position.<sup>104</sup>

#### *Arguments for a leave based system*

4.110 The major argument for a leave based system is that it could improve the filtering of appeals and reduce significantly the number of unmeritorious appeals, with consequent benefits to the parties who remain in the system and to the administration of justice as a whole. A leave requirement will act as an additional hurdle to parties with weak cases.<sup>105</sup> The cost effectiveness of a leave system is highest when there is a relatively high proportion of unmeritorious appeals. Barrow has suggested in relation to United States courts that more study is needed of the time required to review certain types of cases, their reversal rates, and the frequency of meritless appeals in order to identify better the types of civil cases in which discretionary leave will be cost efficient.<sup>106</sup>

4.111 Little empirical work has been conducted to test these views. The empirical research in the Bowman report indicated that in relation to the English Court of Appeal, appeals that had been through the leave filter consistently had a higher success rate than those that had not, suggesting that the leave requirement successfully filtered out some weak appeals.<sup>107</sup> However, the report noted that the overall success rate for appeals that had been the subject of a prior grant of leave was decreasing, while the success rate for appeals not requiring leave had remained fairly steady. The report stated that this finding suggested that the leave requirement was becoming less effective at filtering out unmeritorious appeals. The report suggested that further consideration was needed to provide clearer guidance on when leave to appeal should be required.<sup>108</sup>

4.112 There is no clear and unequivocal measure of what constitutes an unmeritorious appeal. Even if there were, it would be a difficult task to apply such a test to the number and range of appeals in different courts in Australia. One

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104 Bowman report, para 10.

105 *ibid.*

106 B Barrow 'The discretionary appeal: A cost effective tool of appellate justice' (1988) 11 *George Mason University Law Review* 31, 53.

107 Bowman report para 14.

108 *id.*, para 15–16.

possibility is to try to determine merit in an appeal by assessing its prospects of success. One could argue that an unmeritorious appeal is one that has negligible prospects of success or, alternatively, that it is one that is unlikely to succeed. However, factors other than the likelihood of success can influence a decision as to whether an appeal has merit or ought to be run. For example, the grounds for granting special leave to appeal to the High Court include criteria other than that the appeal is likely to succeed. This reflects the High Court's overriding public interest function in determining second appeals. Intermediate courts are more focused on concerns related to the individual case.

4.113 There are some data available on the results of appeals. One rough measure of the success of intermediate appellate courts in achieving their purpose of error correction is the rate at which cases are upheld on appeal. A dismissal of an appeal by an intermediate appellate court usually means that the appellate court found no substantial error by the trial court. However, such a measure is by its nature limited. For example, if an appeal were run and resulted in a divided opinion in the appellate court, it would be difficult to say that the appeal had completely lacked merit, even if it had failed.

4.114 Not all intermediate appellate courts publish data on the success rate of appeals. The Family Court publishes some data on appellate success rates, which may be indicative. The success rate of appeals as a proportion of appeals *decided* by a Full Court of the Family Court is as follows: 1996–97 42%; 1997–98 43%; 1998–99 48%; 1999–2000 44%.<sup>109</sup> This compares with a higher success rate in civil appeals before the High Court of between 60–71% over the same period. Of course, it should be recalled that figures for the High Court generally relate to second appeals brought after a grant of special leave. It should be noted that a large proportion of appeals in the Family Court are abandoned or withdrawn. The percentage of appeals abandoned or withdrawn as a proportion of all appeals *filed* in the Family Court is as follows: 1996–97 29%; 1997–98 40%; 1998–99 37%; 1999–2000 36%.<sup>110</sup> There is no information available in the Court's reported statistics about the reasons for cases being abandoned or withdrawn. Such reasons are likely to be varied and might include a lack of funds, a change in circumstances, a negotiated outcome, or acceptance of the fact that the appeal has no merit.

4.115 These comparisons between the High Court and the Family Court statistics suggest that a leave requirement might reduce the number of appeals that fail and might also filter out at an earlier stage appeals that are prone to abandonment or withdrawal.

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109 Family Court *Annual report 1996–97*, 45; Family Court *Annual report 1997–98*, 42; Family Court *Annual report 1998–99*, 46; Family Court *Annual report 1999–2000*, 27.

110 *ibid.*

4.116 Gleeson CJ has questioned the demand for individualised justice saying that it has ‘placed an immense strain’ upon the justice system.<sup>111</sup> The Chief Justice concluded that

[t]he spirit of our time is such that the demand for individualised justice will not abate. In some areas, that demand has merit; in others it does not. Striking an appropriate balance between this and countervailing policies of the law represents a never-ending challenge.<sup>112</sup>

4.117 Restricting rights of appeal might be justified as preserving the ‘rule making’ ability of an appellate court by conserving resources for those cases with a public interest in the legal outcome. There is growing concern over the use of limited public resources on appeals that lack substantive merit. One particular concern is with appeals that are brought to challenge findings of fact. Such cases are often lost by the appellants, but not before considerable time and expense is incurred. One view is that a system based upon appeals as of right does not sufficiently discourage unmeritorious appeals in relation to the factual findings and inferences of trial judges.

4.118 Unmeritorious appeals may be brought for tactical reasons to bring about additional delay and expense or for other reasons such as a lack of understanding of, or concern with, the merits of a case. There is a concern in federal proceedings that litigants in person may bring a disproportionate number of unmeritorious appeals, particularly in family law proceedings. There has been a significant increase in the proportion of unrepresented appellants in family law matters over recent years.<sup>113</sup> The Family Law Council’s report on family law appeals in 1996 noted that

[p]roblems resulting from unrepresented appellants include delay, failure to address the merits of the appeal, the length of time taken to present oral submissions, unmeritorious appeals and problems associated with the complexity of court procedures.<sup>114</sup>

4.119 Some family law appeals may be the result of lack of knowledge of the relevant law or facts, or be based upon motivations to prolong conflict or contact with another party or as means of demonstrating a parent’s commitment to his or her children. The Commission noted ALRC 89

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111 AM Gleeson ‘Individualised justice — the holy grail’ (1995) 69 *Australian Law Journal* 421, 430.

112 id, 432.

113 The figures are: 1995–96 19%; 1996–97 26%; 1997–98 36%; 1998–99 34%; 1999–2000 37%. These figures do not include applications for leave in person. Family Court *Annual report* various years.

114 Family Law Council *Family law appeals and review: An evaluation of the appeal and review of family law decisions* AGPS Canberra 1996, 38.

[f]amily litigants generally have limited experience with legal processes and some have unreal expectations of litigation, seeking vindication of their side of the debate at the expense of the other party. Frequently, one party will benefit from delay in the resolution of the case, as delay will prolong the time they have control over property or sole responsibility for children.<sup>115</sup>

4.120 It is arguable that any move towards further use of leave to appeal in intermediate appellate courts in Australia is likely to enhance those courts' capacities to manage their growing workload and reduce costs and delays — at least so long as the courts are able to balance properly the effort expended on determining leave applications with that expended on determining appeals. The Law Reform Commission of Western Australia (LRCWA) has recently suggested that the requirement of leave to appeal should apply to any further appeal from a single judge of the Supreme Court to the Full Court.<sup>116</sup> The LRCWA supported the expansion of leave requirements in civil matters.

**Question 4.7.** Which types of appeals to the Federal Court and the Family Court should be as of right and which should be made subject to the grant of leave to appeal? For example, should first appeals in these courts always be by right and second appeals by leave?

**Question 4.8.** Should any appeals under s 34 of the *Judiciary Act* from a single justice of the High Court exercising original jurisdiction to the Full Court of the High Court continue to be as of right?

## Developments in the United Kingdom

4.121 The view that a first appeal should always be available as of right has recently come under challenge in the United Kingdom. The Bowman report suggested that in the case of the English Court of Appeal, significant savings of time and resources can be made through use of a leave process in intermediate appeals.<sup>117</sup> The Bowman report stated

[i]n our system the purpose of the trial or hearing is to dispose of the action and an appeal is not there as an automatic further stage. It is intended that the assumption should be that the court or tribunal has made the correct decision ...we take the view that the law should not confer an automatic right of appeal in all cases. However, an individual who has grounds for dissatisfaction with the outcome should always be able to have his or her case looked at by a higher court so that it can consider whether there appears to have been an injustice and, if so, allow an appeal to proceed.<sup>118</sup>

115 ALRC 89 para 8.22.

116 Law Reform Commission of Western Australia *Review of the criminal and civil justice system* State Law Publisher Perth 1999, 276.

117 Bowman report 34.

118 id, 24.



4.122 The Bowman report suggested that there should be a right to seek leave to appeal, but not necessarily a right to an appeal itself. The report considered that an extended leave requirement could reduce the large proportion of unsuccessful appeals as well as minimising the number of tactical appeals brought only to delay litigation and prejudice the other party. The report noted that the effectiveness of a leave requirement as a screening device was illustrated by the data which showed that, in those cases in which leave was already required, around two thirds of potential appeals were eliminated at the leave stage.<sup>119</sup> Moreover, where leave was obtained, the success rate in the full hearing was uniformly higher across all categories of cases when compared with cases in which an appeal lay as of right.<sup>120</sup>

4.123 The report went on to recommend that the requirement for leave to appeal should be extended to all ordinary civil cases coming to the Court of Appeal<sup>121</sup> arguing that

- ?? the current leave requirement is inconsistent, illogical and complex because leave is necessary for some types of cases but not others
- ?? consideration of the leave requirement provides the opportunity for judicial case management, where leave is granted, in such matters as giving specific directions, determining the length of the hearing and allocating a particular judge to oversee the case, and
- ?? unmeritorious appeals (for example, 'tactical appeals' brought only to delay litigation and prejudice the other party) will be deterred or filtered out at an early stage, helping the Court of Appeal to use its resources more efficiently.<sup>122</sup>

4.124 In response the Lord Chancellor has proposed that there be a general extension of the requirement for leave to appeal to all matters reaching the Court of Appeal, save for certain specified cases.<sup>123</sup>

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119 id, 34.

120 id, 32.

121 id, 35, rec 13.

122 id, 30–35. In this context, it is important to note that in England and Wales an application for leave to appeal should be made initially to the court or tribunal which made the original order, that is 'the court below'. Where leave has not been obtained or has been refused, an application for leave can then be made to the Court of Appeal. At present, about 46% of appeals requiring leave were granted by the court below, rather than by the Court of Appeal.

123 Lord Chancellor's Department *Proposal to extend the requirement for leave to appeal to the Court of Appeal (Civil Division): A Lord Chancellor's Department discussion paper* July 1998. The exceptions involve appeals against committal orders or refusals to grant habeas corpus, adoption cases and child abduction cases.

4.125 Le Sueur and Cornes have noted recently that while the right to one appeal has been recognised as of ‘constitutional importance’ in the United Kingdom there is no authority that it is inviolate.<sup>124</sup> For example, a recommendation of the Council of Europe Committee of Ministers has ‘agreed that appeal procedures should also be available for civil and commercial cases and not only for criminal cases’, but the recommendation also urges restraint and ‘encourages restrictions in the form of leave requirements for civil appeals’. Le Sueur and Cornes comment that it is ‘difficult, if not impossible, to make out a case for a constitutional right to a second appeal for people in the United Kingdom’.<sup>125</sup>

4.126 Both the Woolf final report and the Bowman report recommended that leave to appeal be required for all interlocutory appeals.<sup>126</sup> The Bowman report suggested that in addition to the existing test for granting leave to appeal in the English Court of Appeal, leave to appeal against an interlocutory decision should be granted only if it is at an appropriate stage of the proceedings for the particular appeal to be heard.<sup>127</sup>

### **Case study: Appeals from magistrates to the Family Court**

4.127 When a federal court hears an appeal from a decision of a magistrate exercising original federal jurisdiction, special factors might be relevant to the question whether the appeal should be as of right or by leave of the court. An example of this situation arises in the context of appeals to the Family Court from state magistrates or federal magistrates in matters of family law.<sup>128</sup>

4.128 The Family Court deals with appeals from state and territory courts of summary jurisdiction in family law matters, except in Western Australia and the Northern Territory, where appeals are heard by the Family Court of Western Australia and the Northern Territory Supreme Court respectively. An appeal under s 96 FLA is as of right and is generally heard by a single judge. Under s 28(2) FLA, an appeal from a court of summary jurisdiction to the Family Court can be heard by a Full Court of the Family Court, but this is very unusual.

4.129 Section 96 FLA requires that appeals to the Family Court from state or territory courts of summary jurisdiction proceed by way of hearing de novo.

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124 A Le Sueur & R Cornes *What do the top courts do?* The Constitution Unit, School of Public Policy, University College London, London June 2000, 9.

125 *ibid.*

126 Woolf final report 165, rec 174; Bowman report 142, rec 13.

127 Bowman report 39, rec 19.

128 A further example is an appeal from a decision of a federal magistrate to the Federal Court pursuant to s 24(1)(d) FCAA.

A hearing *de novo* involves a complete rehearing of a matter. The case is thus conducted virtually as if the matter had not arisen for determination before. Subject to any statutory provisions or rules of court, evidence is presented and submissions made at a hearing *de novo* in the same way as at any original hearing.<sup>129</sup>

4.130 There may be some debate as to whether a hearing *de novo* is truly an appeal, rather than a re-exercise of original jurisdiction. However, for the purposes of this Chapter it is convenient to adopt the description used by the legislation itself. The Family Law Council has also expressed the view that a hearing *de novo* satisfies the meaning of an ‘appeal’ under s 4(1) FLA as including ‘an application for re-hearing’.<sup>130</sup>

4.131 Section 69N FLA provides that the consent of both parties is required before a magistrate may hear and determine parenting matters to the stage of making final orders. It has been argued that where the parties have given their consent and a matter has been heard and determined by a magistrate

it is unfair to the successful party, extravagant of the financial resources of the parties and a waste of judicial and other resources to allow an appeal as of right, particularly one proceeding by way of hearing *de novo*, as sections 96(1) and (4) presently provide. ... The same probably can be said for appeals from ‘final’ property decisions of Magistrates where there has been a consent as to jurisdiction pursuant to section 46.<sup>131</sup>

4.132 One option for reform would be to require that appeals to a single judge of the Family Court from state magistrates be available only by leave of the Family Court. In satisfying the Court of the appropriateness of granting leave, the appellant might be required to demonstrate that there is a reasonable and proper basis for an appeal, or that the magistrate erred in fact or in law, rather than have an automatic ‘second bite at the cherry’.<sup>132</sup>

4.133 In its report on family law appeals, the Family Law Council concluded that in cases where magistrates specialise in family and children’s law there seems little point in providing the parties with an appeal as of right by way of hearing *de novo*.<sup>133</sup> If it were decided that there should be no appeal by right from a decision of a magistrate who specialised in family law, it may be necessary to have some system for certifying the expertise of magistrates. Alternatively, it might be possible to limit appeals from magistrates to questions of law.

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129 CCH ‘Courts procedure and evidence’ *Australian family law and practice* Vol 2, para 53–110.

130 Family Law Council *Family Law Appeals and Review* FLC Canberra June 1996, paragraph 2.06.

131 S Mitchell ‘Family Law in the Local Courts’ *Paper* for 7th Annual Family Law Masterclass conference Business Law Education Centre Sydney 9–10 March 1998.

132 *ibid.*

133 Family Law Council *Family law appeals and review: An evaluation of the appeal and review of family law decisions* Commonwealth of Australia Canberra 1996, 49.

4.134 The issues raised above in the context of appeals from state magistrates to the Family Court are also relevant to appeals from the Federal Magistrates Court to the Family Court. Consideration should be given to whether such appeals should be as of right or by leave and the relevance, if any, of the magistrate's specialisation.

**Question 4.9.** Should appeals from state magistrates to the Family Court be by right or by leave? Should such appeals be by leave only if the magistrate is recognised as a specialist in the subject matter of appeal? Should such appeals be restricted to questions of law?

**Question 4.10.** Should appeals from the Federal Magistrates Court to the Family Court be by right or by leave? Should such appeals be by leave only if the magistrate is recognised as a specialist in the subject matter of appeal? Should such appeals be restricted to questions of law?

### Criteria for granting leave

4.135 If appellate courts are to make greater use of leave requirements, the criteria used to determine the exercise of that discretion assume central importance. The significance of error correction on first appeal is also likely to require the leave process to be structured in a way that ensures that case management is not achieved at the expense of justice in individual cases. The LRCWA has recommended that a statute conferring a right of appeal should clearly specify the nature of the appeal, any limitations on the appeal, and the procedure to be followed on the appeal.<sup>134</sup>

4.136 There are several approaches to specifying the criteria for granting leave. Barrow, in relation to the American judicial system, has suggested the following factors.<sup>135</sup>

?? The criteria should reflect the distinct purposes served by appeals to intermediate appellate courts and to courts of last resort. The criteria relevant to an intermediate appellate court should focus on identifying incorrect trial court decisions, while those pertaining to a court of last resort should focus on identifying opportunities to announce, clarify and harmonise the law.

<sup>134</sup> Law Reform Commission of Western Australia *Review of the criminal and civil justice system* State Law Publisher Perth 1999, rec 345.

<sup>135</sup> B Barrow 'The discretionary appeal: A cost effective tool of appellate justice' (1988) 11 *George Mason University Law Review* 31, 45.

- ?? If the main purpose of an appeal is error correction, then its effect on future litigants should be irrelevant in granting leave. However, where the appeal's basic function is legal development, the capacity of the court to articulate rules appropriate for the future is crucial.
- ?? The level of abstractness or concreteness of the criteria should impact on the degree of judicial consistency in applying the criteria. In the case of appeals for error correction, only a small degree of inconsistency between cases is acceptable and the criteria must be narrowly defined. However, a more abstract test with broader discretion is appropriate for appeals that focus on legal development.

4.137 As noted above, appeals to Australia's intermediate courts are generally by right and not by leave, except for appeals concerning interlocutory orders. The Federal Court and the Family Court have developed broad criteria to determine leave applications for interlocutory matters. Such an approach is based on the view that there should generally be no appeals on procedural matters because they do not alter the substantive rights of the parties and only serve to interrupt the usual course of proceedings.

4.138 The Full Court of the Federal Court has held that the major considerations to be applied by the Court in deciding whether to grant leave to appeal from an interlocutory order are

- ?? whether in all the circumstances the judgment of the primary judge was attended by sufficient doubt to warrant it being reconsidered by the Full Court, and
- ?? whether substantial injustice would result if leave were refused supposing the decision was wrong.<sup>136</sup>

4.139 The Family Court has adopted similar principles in considering applications for leave to appeal and, in particular, adopts the principle that an appellate court should exercise caution in reviewing interlocutory decisions relating to practice and procedure.<sup>137</sup> The Family Court considers whether there has been an error of principle and whether the decision is one that results in a substantial injustice to one of the parties.<sup>138</sup>

4.140 If the Federal Court and the Family Court were to make greater use of leave requirements it would be necessary for legislation to provide guidance as to the relevant principles to be applied. In contrast with the criteria for special leave to

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136 *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 104 ALR 621, 622.

137 *In the Marriage of Rutherford* (1991) 15 Fam LR 1, 5 referring to *AP Brown Male Fashions Pty Ltd v Phillip Morris Inc* (1981) 148 CLR 170, 177.

138 *In the Marriage of Rutherford* (1991) 15 Fam LR 1.

appeal to the High Court, in the case of the Federal Court and the Family Court there is likely to be a greater emphasis on developing more narrowly defined criteria that focus on the function of error correction.

4.141 According to Barrow, as noted above, if an appeal constitutes a review of the correctness of a trial decision, the criteria for leave should not consider the impact of the decision on future litigants.<sup>139</sup> Instead, the criteria should aim to ensure that an appeal is granted wherever there is variation from the institutionally approved norm or where the consequences of the trial court decision are so important to the litigant that even the risk of variation from this norm should be eliminated. Specifically, in his view leave to appeal should be granted whenever

- ?? the trial court's decision conflicts with a constitutional provision, statute or controlling judicial opinion
- ?? the trial court's decision relies upon the resolution of a question of law that is not addressed by an existing constitutional provision, statute or controlling judicial opinion
- ?? a trial court ruling is erroneous, although it may later be determined to be harmless error, or
- ?? a final decree awarding specific performance or a permanent injunction has been entered.<sup>140</sup>

4.142 In the United Kingdom, the Bowman report adopted the principles developed by the English Court of Appeal in *Smith v Cosworth Casting Processes Ltd*<sup>141</sup> and recommended the following general criteria for determining leave applications

- ?? leave to appeal will only be refused if the applicant has no realistic prospect of succeeding on appeal, and
- ?? leave may be granted, even if the appeal has no realistic prospect of success, where it is in the public interest to do so, such as if the case raises an issue where the law requires clarification.<sup>142</sup>

4.143 It might be argued that more precise criteria relating to error correction, and guidance as to the relative importance of those criteria compared with those concerned with legal development, might be useful for an intermediate appellate court.

139 B Barrow 'The discretionary appeal: A cost effective tool of appellate justice' (1988) 11 *George Mason University Law Review* 31, 43.

140 id, 54.

141 [1997] 4 All ER 840.

142 Bowman report, 39–40.

**Other issues relating to leave*****Level of regulation: Statute, rules of court or judicial decision?***

4.144 A further issue is whether criteria for leave should be regulated by statute, rules of court, practice directions or left to judicial formulation. A structured discretion in a statute is likely to provide greater guidance to users of the system than the other options, particularly the option of leaving it to the case law. On the other hand, statutory criteria, if not satisfactorily framed, could lead to uncertainty about the scope of the discretion. Similar arguments apply as to whether the criteria should be exhaustive or non exhaustive. Generally, it might be expected that non exhaustive criteria would be more appropriate in dealing with leave applications so that proper attention can be given to the potentially wide range of circumstances.

4.145 According to Barrow, whether the legislature establishes the criteria by statute or the judiciary does so by rules of court depends on the requisite balance between the legislative and judicial branches of government.<sup>143</sup> He contends that a broad statement of legislative principle implemented by specific rules of court may provide an appropriate balance. Barrow suggests that both statute and rules of court are generally available to litigants and subject to modification through an orderly and readily accessible process. However, he argues that judicial formulation cannot 'effectively promulgate such criteria' because of the limitations on accessibility, even of a published opinion. The need for accessibility of laws regulating the judicial power of the Commonwealth is discussed in detail in Chapter 8.

***Who should consider leave applications?***

4.146 A major issue is who should bear responsibility for considering applications for leave to appeal. One view is that application for leave should be made to the court that made the decision appealed from because

- ?? that court, having heard the case, should be able to consider quickly and efficiently whether or not grounds for appeal exist
- ?? the cost of an application for leave made to the court below at the end of a hearing is negligible in terms of court time, preparation time and professional fees, and
- ?? allocating the task to the higher court will place greater burdens on it, with the risk that it may be flooded with applications that reduce its capacity to deal with other significant work.<sup>144</sup>

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143 B Barrow 'The discretionary appeal: A cost effective tool of appellate justice' (1988) 11 *George Mason University Law Review* 31, 51–52.

144 Bowman report, 36.

4.147 The arguments for the appellate court undertaking the task are that

- ?? the appellate court may have greater expertise and authority to determine the merits of the application
- ?? it is likely to unsettle some potential appellants if the court that has ruled against them determines whether leave should be granted to appeal to a higher court. This may be especially so in intermediate appeals where the ground of review is based on the trial court's error, and
- ?? there may be a tendency for the lower court to be less willing than the appellate court to rule out weak cases, a tendency confirmed by the Bowman report's empirical data.<sup>145</sup>

4.148 If the determination is to be made by the higher court, a further question arises as to who should make the determination. As noted in paragraphs 4.210–4.216, in the discussion regarding the High Court's special leave procedures, there are arguments for assigning only one judge or, alternatively, for assigning more than one. It might be possible to determine on the application papers what number of judges would be appropriate to determine a particular leave application. Complex cases or those raising considerable public interest might require more judges than cases that appear straightforward and uncontroversial. Another option is that the court could determine leave applications on the written papers, without the need for an oral hearing.

### *Review of leave determinations*

4.149 It is also necessary to consider whether a decision granting or refusing leave should itself be immune from appeal. One view is that permitting review of leave determinations defeats the purpose of having a leave requirement in the first place. Responses to this issue might depend on the level of courts involved, the criteria established to determine leave, and the method by which a leave application is determined. Thus, for example, if three judges of the appeal court were to determine the application there would seem to be little point in allowing an appeal from the leave determination to another bench of three judges. There might be more point to allowing an appeal if the leave application were initially determined on the papers by a single judge.

4.150 It should also be noted that review of a leave determination is a review of the exercise of a discretion. Consequently, the reviewing court will be limited in the grounds on which it can change the leave determination. This might suggest that there is little point in allowing review of leave determinations. By way of comparison, the cross-vesting legislation does not allow appeals in relation to applications for a transfer of a proceeding, although that legislation is limited to

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<sup>145</sup> id, 37.



determining the appropriate venue for the trial rather than the question whether an action can proceed at all.<sup>146</sup>

### ***Rescission of grant of leave***

4.151 Finally there is the issue whether the appellate court should be able to rescind leave at some point after it has been granted. A power of rescission might be exercised, for example, where the appeal court on consideration of the application papers or after hearing argument considers that the appeal clearly has no merit.

The following questions are asked in relation to the jurisdiction of federal courts in relation to first appeals.

**Question 4.11.** If leave to appeal were required, what should the criteria for granting leave be?

**Question 4.12.** Should the criteria for granting leave be regulated by statute, rules of court, practice directions or left to judicial formulation?

**Question 4.13.** To whom should applications for leave be made: the judge who made the order appealed from; another judge of the court from which the appeal is taken; or the appellate court?

**Question 4.14.** If a determination is to be made by the appellate court, how many judges should constitute the bench making the determination?

**Question 4.15.** Should an order granting or refusing leave be immune from appeal itself?

**Question 4.16.** Should the appellate court have the power to rescind leave and, if so, in what circumstances?

### **Other means of reducing unmeritorious appeals**

4.152 The use of leave to appeal is not the only means by which the number of unmeritorious appeals could be reduced. In assessing the need for leave requirements it is also necessary to assess the efficacy of other options.

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146 s 13 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth). Also see Ch 3.

4.153 It is undoubtedly true that the general costs and delays associated with appeals will deter some potential appellants from appealing a decision with which they are dissatisfied. However, the general costs of appellate litigation may not deter litigants with ‘deep pockets’ such as large corporations and government, nor those who use an appeal as a tactical weapon, for example, to achieve a better settlement. Moreover, the impact of costs on the propensity of a litigant to appeal may have no bearing on the merits of the appeal.

4.154 More direct disincentives to prosecute unmeritorious appeals include the imposition of costs sanctions, orders that a person be declared a vexatious litigant with consequential limitations on their rights to initiate proceedings, and powers to dismiss proceedings. One limitation on the effectiveness of each of these options is that they can generally be imposed only after an appeal has been instituted. Thus, they are not preventive measures in the same way as a leave requirement might be.

### ***Costs sanctions***

4.155 The Family Court and the Federal Court have a general power to award costs in civil proceedings at their discretion, as do all Australian superior courts. The Federal Court Rules expressly provide that this power is exercisable at any stage of proceedings.<sup>147</sup> However, legislation may provide for specific rules as to costs in relation to certain types of matters. For example, s 347(1) of the *Workplace Relations Act 1996* (Cth) provides that costs should not be ordered in proceedings arising under the Act against a party unless that party instituted the proceeding vexatiously or without reasonable cause. Such provisions as to costs may not necessarily apply to every court.<sup>148</sup>

4.156 The threat of cost sanctions may be of little deterrence to the instigation of unmeritorious appeals by impecunious litigants. Nor will cost sanctions necessarily deter wealthy parties who may be willing and able to absorb the costs to achieve other tactical goals. Nor will cost sanctions deter parties who are committed to litigation for deep-seated emotional or psychological reasons.

4.157 There is a concern that costs sanctions are not used enough in family law proceedings. The general rule in the Family Court is that parties pay their own costs<sup>149</sup> but the Court has the power to penalise failure to comply with the rules or

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147 O 62 r 3 FCR.

148 *In re McJannet; Ex parte the Australian Workers' Union of Employees, Queensland [No 2]* (1997) 189 CLR 654, the High Court considered that the now repealed s 347(1) of the *Industrial Relations Act 1988* (Cth), which was subsequently substituted in the same terms by s 347(1) of the *Workplace Relations Act 1996* (Cth), applied to proceedings before the Federal Court but did not apply to costs in relation to High Court proceedings.

149 s 117 (1) FLA. See also para 4.244–4.250, regarding costs in relation to s 95(b) FLA.

abuse of court process through costs orders.<sup>150</sup> However, for several reasons, including the limited financial means of many litigants and the need to maintain a working relationship between the parties, judges make relatively few costs orders.<sup>151</sup>

### ***Orders with respect to vexatious litigant***

4.158 The Federal Court and the Family Court each has the power to declare a litigant ‘vexatious’. These powers are not widely used.

4.159 The Federal Court has power to declare a litigant vexatious where the Court is satisfied that the person has habitually, persistently and without reasonable grounds instituted other vexatious proceedings in the Court or any other Australian court.<sup>152</sup> This power will apply, irrespective of the person’s motive, if the proceedings ‘are so obviously untenable or manifestly groundless as to be utterly hopeless’.<sup>153</sup>

4.160 The Family Court, where satisfied that proceedings are frivolous or vexatious, has power under s 118 FLA to dismiss proceedings; make orders as to costs; and, on the application of a party, order that the person who instituted the proceedings may not institute any further proceedings without leave of the Court. Such orders can be made on the application of a party or on the Court’s own motion.<sup>154</sup> The Full Court of the Family Court has remarked

[t]he fact that a party seeks to assert his or her rights of appeal should not, in our view, be a matter to be taken into account against him or her in proceedings under s 118 of the Family Law Act or under O 40 r 6 of the Family Law Rules, or under the provisions governing the grant of stays, unless *a clear pattern emerges* of a series of hopeless appeals being filed which consistently challenge almost any ruling about which the appellant feels aggrieved.<sup>155</sup>

### ***Power to dismiss appeal proceedings***

4.161 The Federal Court and the Family Court each has power to dismiss an appeal where the appellant has not complied with procedural requirements. However, in the case of the Family Court, the power does not appear to extend to dismissing an appeal for lack of substance or merit.

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150 In considering whether to make such orders, the Court must have regard to a number of factors, including the conduct of the parties in relation to the processes of litigation, their compliance with previous orders of the Court and their financial circumstances: s 117(2A) FLA.

151 Australian Law Reform Commission Discussion Paper 62 *Review of the federal civil justice system* Sydney August 1999, para 11.132 (ALRC DP 62).

152 O 21 r 1 FCR.

153 CCH *Australian High Court and Federal Court practice* Vol 2, para 24–663.

154 O 40 r 6 FLR.

155 *Vlug v Poulos* (1997) 22 Fam LR 324, 350 (emphasis added).

4.162 In relation to the Family Court, O 32 r 18(1) FLR provides

Where an appellant has not met a requirement of these Rules or the Regulations or in some other way has not shown reasonable diligence in proceeding with the appeal, a Full Court may, subject to this rule: (a) by order, dismiss the appeal; (b) by order fix a time at which, or within which, the requirement is to be met and at the same time make an order that the appeal will be dismissed if the requirement is not met at or within the time fixed; or (c) make any other order the court thinks just.

4.163 In ALRC 89 the Commission recommended that the *Family Law Act* be amended to permit a single judge in an appeal to exercise the powers of the Family Court to stay or dismiss any proceeding where

- ?? no reasonable cause of action is disclosed
- ?? the proceeding is frivolous or vexatious, or
- ?? the proceeding is an abuse of the process of the court.<sup>156</sup>

4.164 In relation to the Federal Court, O 20 r 2 FCR provides that where in any proceedings it appears to the Court that no reasonable cause of action is disclosed, the proceeding is frivolous or vexatious, or the proceeding is an abuse of the Court, the Court may order that the proceedings be stayed or dismissed generally or in relation to any claim for relief. In *Wilson v Hollywood Toys (Aust) Pty Ltd*<sup>157</sup> the Federal Court held that this power applies to appeals. In *D’Ortenzio v Telstra*<sup>158</sup> O’Loughlin J raised the issue whether a single judge has jurisdiction to dismiss an appeal under O 20 r 2 where the appellant fails to invoke properly the appellate jurisdiction of the Court because of a fundamental inadequacy of the appeal documents. O’Loughlin J concluded that as the power to stay or strike out an appeal was not included in s 25 FCAA, a single judge was not empowered to dismiss the appeal. His Honour said

I regard this question as one of practical and increasing importance. The number of self-represented litigants who are approaching the Full Court is increasing and if a single judge is empowered to deal with inadequate documents or deficiencies in documents by using the powers that are contained in Order 20, r 2(1), it would greatly assist the expeditious handling of the Court’s business.<sup>159</sup>

4.165 In ALRC 89 the Commission recommended that s 25 FCAA be amended to allow a single judge to stay or dismiss an appeal where no available ground of appeal is disclosed.<sup>160</sup>

156 ALRC 89, para 8.283–8.284; rec 116.

157 (1996) 68 FCR 84.

158 (1998) 154 ALR 577.

159 id, 583, followed in *Van Oostveen v Commonwealth* [1998] FCA 1261 (29 September 1998).

160 ALRC 89 para 7.41, rec 73.

4.166 In summary, it would appear that the additional mechanisms just described do not act as a sufficient deterrent for unmeritorious appeals. There is no empirical work available to test this view but the increasing number of intermediate appeals in federal courts and the available data on success rates of appeals would seem to suggest that other mechanisms may be required.

## **Access to a second appeal — the High Court and special leave to appeal**

### **Introduction**

4.167 Prior to 1976 there was a tripartite structure of appeals to the High Court, which had existed since the enactment of the *Judiciary Act*. Pursuant to s 35(1) JA, appeals could be brought to the High Court as follows.<sup>161</sup>

- ?? As of right. These appeals were available from final judgments of the Supreme Court of a state or other court of a state from which, at the establishment of the Commonwealth, an appeal lay to the Privy Council. However, the judgment had to relate to a claim of more than £300<sup>162</sup> or affect the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy or insolvency.
- ?? With leave to appeal. If the judgment was interlocutory, an appeal could not be brought except by leave of the Supreme Court or the High Court. An application for leave to appeal had to show that the judgment appealed from was arguably wrong.
- ?? With special leave to appeal. This avenue of appeal was available from any judgment, whether final or interlocutory, with respect to which the High Court granted special leave to appeal. In addition to showing that the judgment appealed from was arguably wrong, a special leave application had to involve an issue of public importance.<sup>163</sup>

4.168 By way of amendment to s 35 JA in 1976, the special leave process became, in effect, the ‘default’ procedure by which appeals reached the High Court.<sup>164</sup> Appeals as of right still existed where the sum in question was more than

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161 A Mason ‘The evolving role and function of the High Court’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 111.

162 The monetary limit was increased to £1 500 in 1955 and \$20 000 in 1976 See *Judiciary Act 1955* (Cth) s 2; *Judiciary Amendment Act 1976* (Cth) s 6.

163 See *Ex parte Bucknell* (1936) 56 CLR 221 for an early case on the distinction between leave and special leave.

164 s 35(2) JA; see also s 33(a) FCAA and s 95(a) FLA, for special leave provisions for appeals from the Federal Court and Family Court respectively.

\$20 000,<sup>165</sup> where the point at issue was constitutional in character,<sup>166</sup> or where the judgment appealed from was rendered by a single judge (or any number less than the Full Court) of the High Court.<sup>167</sup>

4.169 In 1984, appeals as of right were largely eliminated. Since then, with one exception discussed below, second appeals can only be brought from intermediate appellate courts to the High Court by way of special leave.<sup>168</sup> Section 35(2) JA provides that an appeal cannot be brought from the Supreme Court of a state or from a state court exercising federal jurisdiction unless the High Court grants special leave to appeal. Section 35AA provides that an appeal shall not be brought from the Supreme Court of the Northern Territory unless the High Court gives special leave. Similar requirements for special leave to appeal from the Federal Court are provided by s 33 FCAA and for appeals from the Family Court by s 95(2)(a) FLA. Additionally, appeals from the Supreme Court of Nauru exercising its appellate jurisdiction in civil and criminal cases are only ‘with leave of the High Court’, although the significance of the term ‘leave’ rather than ‘special leave’ in this context is unclear.<sup>169</sup>

### *Section 35A of the Judiciary Act*

4.170 Section 35A was added to the *Judiciary Act* in 1984 stipulating the criteria for granting special leave. Section 35A provides that the High Court, in considering an application for special leave to appeal, ‘may have regard to any matters it considers relevant’, but directs the Court that it ‘shall have regard to

- (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
  - (i) that is of public importance whether because of its general application or otherwise; or
  - (ii) in respect of which a decision of the High Court, as a final appellate court, is required to resolve differences of opinion between different courts, or within one court, as to the state of the law; and
- (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgments to which the application relates.

### *The purpose of special leave*

4.171 In *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth*, the High Court described special leave as ‘a long-established procedure which enables an appellate court to control in some measure or filter the volume of work requiring

<sup>165</sup> s 35(3) JA; also, s 33(b) FCAA in respect of appeals from the Federal Court.

<sup>166</sup> s 35(6) JA.

<sup>167</sup> s 73(i) Constitution.

<sup>168</sup> s 35(2) JA.

<sup>169</sup> See *Nauru (High Court Appeals) Act 1976* (Cth), Schedule, Article 1B.

its attention'.<sup>170</sup> At the time of its introduction in 1984, it was considered that the special leave requirement would rationalise and reduce the increasingly onerous appellate workload of the Court.<sup>171</sup> O'Brien commented

[t]he exercise of the [High Court's special leave] jurisdiction in civil matters is not directed to producing a substantive analysis of the lower courts' judgments. Rather, it is directed to determining whether the case is sufficiently special to attract a substantive hearing.<sup>172</sup>

4.172 Sir Anthony Mason has said that the

[r]equirement of special leave, as a condition of an appeal to the High Court, stems from acceptance of the proposition that litigants are entitled to one appeal from a judgment at first instance, but a second appeal to an ultimate court of appeal can only be justified if it is in the public interest.<sup>173</sup>

... the larger the number of applications, the lower the percentage of successful applications. That's because ... special leave is a filtering mechanism. Since the number of cases which the court can properly deal with in any one year is limited, it is necessary to make a careful choice of those cases which, in light of the relevant considerations, are deserving of attention.<sup>174</sup>

4.173 These comments are reflected in Figure 3, which shows the contrast between the dramatic increase in the number of civil applications for special leave filed from 1983–84 to date, and the relatively steady number of civil appeals filed over the same period.

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170 (1991) 173 CLR 194, 218.

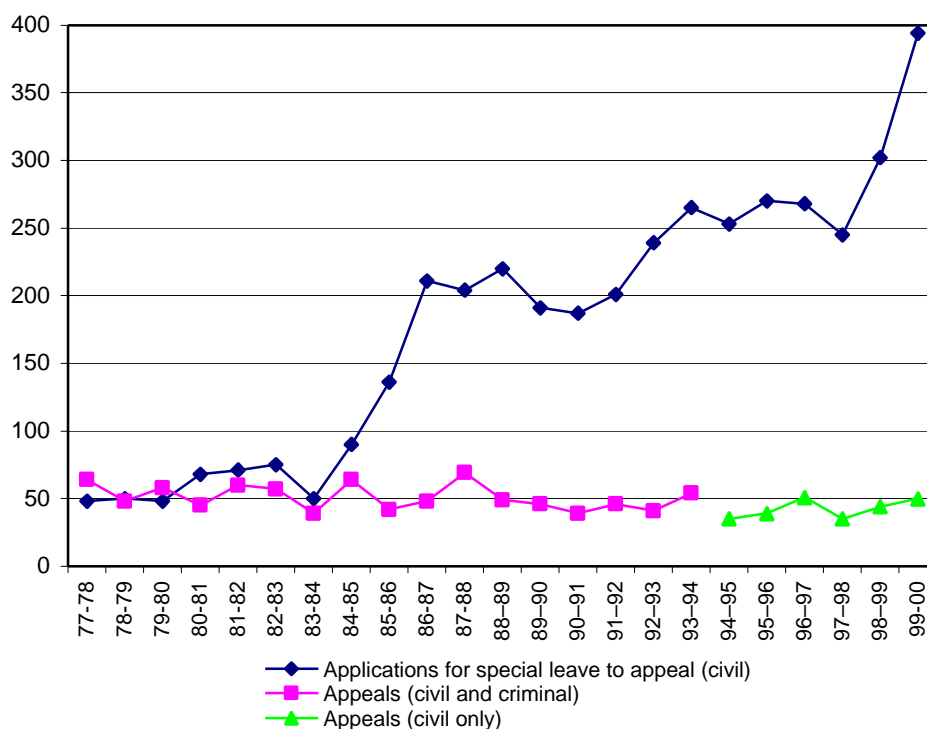
171 During the second reading speech of the amending legislation (the Judiciary Amendment Bill (No 2) 1984), the Attorney-General, Senator Gareth Evans, pointed out that the justices of the High Court had expressed concern about the effect of the increasing workload of the High Court on its capacity to function effectively as a final appellate court in Australia. See *Hansard* (Sen) 8 March 1984, 584–5. See S O'Bryan 'High Court appeals' (1984) 19 *Australian Law News* 11.

172 D O'Brien *Special leave to appeal* LBC Sydney 1996, 49.

173 A Mason 'Regulation of appeals to the High Court of Australia: The jurisdiction to grant special leave to appeal' (1996) 15 *University of Tasmania Law Review* 1, 4.

174 B Virtue 'High Court is planning new rules' (1993) 28 *Australian Lawyer* 18, 21–2.

**Figure 3: Volume of special leave applications and appeals filed in the High Court in civil matters.**



Source: High Court of Australia *Annual reports*, various years.

Note: For the years 1977–78 to 1993–94 separate figures are not available for civil and criminal appeals.

### *Constitutional validity of ‘special leave’*

4.174 The validity of the special leave procedure introduced in 1984 was upheld in *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth*,<sup>175</sup> where the High Court unanimously rejected a challenge to the validity of s 35(2) JA and s 33(3) FCAA. The validity of these provisions was upheld on the ground that the requirement for special leave to appeal is a condition of an appeal to the High Court, and imposition of that requirement constitutes a ‘regulation’ of the appeal within the meaning of s 73 of the Constitution. The Court also rejected the contention that the function of granting special leave is an exercise of legislative rather than judicial power.<sup>176</sup> Similarly, in *Carson v John Fairfax & Sons Ltd*<sup>177</sup> the

<sup>175</sup> (1991) 173 CLR 194.

<sup>176</sup> A Mason ‘The regulation of appeals to the High Court of Australia: The jurisdiction to grant special leave to appeal’ (1996) 15 *University of Tasmania Law Review* 1, 5.

<sup>177</sup> (1991) 173 CLR 194, 203.

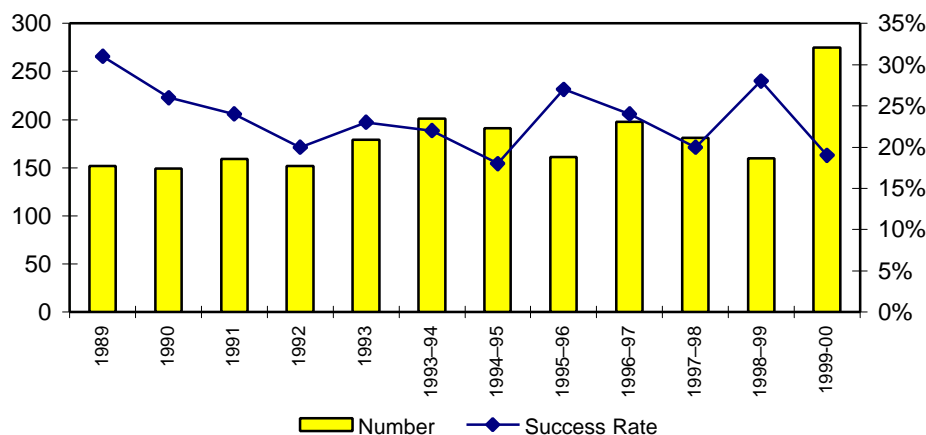


High Court upheld the validity of the requirement for special leave in relation to appeals from the Supreme Courts of the states.<sup>178</sup>

### Impact of special leave on the work of the High Court

4.175 The special leave criteria demonstrate the importance of special leave as a mechanism for enabling the High Court to regulate both the volume and content of its workload. The regulation of *volume* can be seen from Figure 4, which shows that in recent years the special leave procedure has allowed the High Court to screen out between 69% and 82% of potential civil appeals — since 1989 the success rate of civil applications for special leave has fluctuated between 18% and 31%. Figure 4 significantly understates the High Court's total caseload because of the number of matters heard by a Full Court of the High Court exercising original jurisdiction (such as cases removed into the Court pursuant to s 40 JA — see Chapter 3).

**Figure 4 — Success rate of civil applications for special leave to appeal decided by High Court**



Source: High Court of Australia *Annual report*, various years.

4.176 The criteria applied in granting or refusing leave also illustrate the Court's control over the *content* of its workload, enabling the Court to balance its appellate functions of legal development and error correction. The broad criteria for granting special leave enable the High Court to concentrate on appeals that announce, clarify and harmonise the law, having regard to the impact of the decision beyond the immediate case under appeal. Yet, the function of error correction is not excluded, since the *Judiciary Act* also requires the Court to have regard to the

<sup>178</sup> D Jackson 'Practice in the High Court of Australia' (1996-97) 15 *Australian Bar Review* 187, 190.

interests of the administration of justice in the particular case (s 35A(b)). In this sense the special leave criteria appear to comport with the principles expressed by Barrow in relation to the United States judicial system.<sup>179</sup>

4.177 The screening process undertaken through the special leave procedure would also appear to have a significant impact on the outcome of appeals heard. The High Court publishes data that shows consistently high success rates in civil appeals. Annual data from 1996–97 to 1999–2000 shows that between 60% and 71% of civil appeals were allowed by the High Court.<sup>180</sup> The High Court screens almost all appeals through a process that is designed, *inter alia*, to eliminate appeals that have little prospect of success. In intermediate appellate courts, by contrast, most appeals are brought as of right, so that one might predict lower rates of success on appeal — a prediction borne out by data available in relation to intermediate appeals in the Family Court (See paragraphs 4.114–4.115).

4.178 Sir Anthony Mason has commented

[t]he introduction of special leave as a prerequisite for an appeal had the effect of reducing the number of substantive matters in which the Full Court is called upon to deliver a reserved judgment from ninety to approximately sixty to sixty-five per annum. However, as a percentage of the appeals as of right were relatively uncomplicated, the smaller number of matters does not mean that there is a lesser burden of work, as virtually all these appeals involve important questions of principle. At the same time the number of special leave applications has continued to increase. They presently number over three hundred and fifty per annum.<sup>181</sup>

4.179 Sir Anthony noted that the 1984 amendments have brought about ‘a sharp decline in the number of appeals in “run of the mill” personal injury cases which had formerly satisfied the pecuniary qualifications governing appeals as of right’.<sup>182</sup> Other ‘casualties’ of the amendments were appeals in contract cases which also had previously satisfied the pecuniary qualifications.<sup>183</sup>

4.180 Sir Anthony noted that the criteria for special leave tend to favour cases involving questions of statutory interpretation because the answers to such questions are likely to have general significance and satisfy the public or general importance test.<sup>184</sup> He acknowledges that there is ‘some force in the view that the criteria favour public law questions over private law questions’, although it is difficult to determine whether this is so.

4.181 Such comments raise the question whether any change is necessary to the special leave criteria, although the Commission is not presently aware of any body

179 B Barrow ‘The discretionary appeal: A cost effective tool of appellate justice’ (1988) 11 *George Mason University Law Review* 31.

180 High Court of Australia *Annual report* various years.

181 A Mason ‘The evolving role and function of the High Court’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000, 120.

182 *id.*, 113.

183 *ibid.*

184 *id.*, 114.

of evidence to suggest that the current criteria have caused any significant difficulties. As discussed below, the High Court has developed considerable jurisprudence on the grounds for granting or refusing special leave applications. One issue is whether the statutory criteria should be altered to give more detailed guidance on the factors that support or negate the granting of special leave. This could include a non exhaustive list of factors including, for example, those listed as grounds for refusal in paragraph 4.198. One additional factor might be the number of times the matter has already been the subject of appeal and the position in the judicial hierarchy of any courts that have heard such appeals.

**Question 4.17.** Are any changes needed to the criteria identified in s 35A of the *Judiciary Act* for granting special leave to appeal to the High Court? For example, should the criteria place more emphasis on matters raising significant questions of private law?

## United States and Canadian approaches

### *United States Supreme Court*

4.182 In 1988, legislation was enacted to remove almost all areas of the United States Supreme Court's review by right of appeal.<sup>185</sup> The effect was to make review essentially discretionary by way of the writ of certiorari. Prior to 1988, statutes setting out the Supreme Court's jurisdiction drew a distinction between 'appeal' and 'certiorari' as mechanisms for appellate review of state and lower federal courts decisions.<sup>186</sup> Examples of the remaining appeals jurisdiction include appeals of decisions made by a district court of three judges and where specific statutes authorise appeals to the Supreme Court.<sup>187</sup>

4.183 Rule 10 of the Supreme Court's Rules provides as follows with regard to the considerations governing review on certiorari.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial

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185 28 USC s 1251–1258.

186 E Chemerinsky *Federal jurisdiction* 2<sup>nd</sup> ed Aspen Law & Business Boston 1994, 584.

187 id, 585.

proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.<sup>188</sup>

4.184 The Court provides a guide for prospective unrepresented petitioners for writs of certiorari which notes that

[t]he primary concern of the Supreme Court is not to correct errors in lower court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved. The denial of a petition for a writ of certiorari signifies only that the Court has chosen not to accept the case for review and does not express the Court's view of the merits of the case.<sup>189</sup>

#### ***Other United States courts of last resort***

4.185 The United States Supreme Court has no authority to hear and determine matters arising in state jurisdiction. Consequently, in such matters state courts act as the courts of last resort. The criteria used in seeking leave to those courts may also have relevance to the Commission's current inquiry.

4.186 There is a wide variety of criteria used in state courts of last resort in the United States to determine whether leave to appeal should be granted. The most frequently used criteria are the relative importance of the question presented and the conflict of the decision with another decision, usually either by the court of last resort or the intermediate appellate court.<sup>190</sup> Other criteria used less frequently are whether the decision being reviewed validates or invalidates an ordinance; state or federal statute; construes a state or federal statute; or involves the appellate court's supervisory authority over other courts.

4.187 In relation to appellate courts of last resort in the United States, Barrow argues that leave to appeal should be granted only in a case that involves a material question

188 <[www.supremecourtus.gov/ctrules/rules.pdf](http://www.supremecourtus.gov/ctrules/rules.pdf)> (3 October 2000).

189 Office of the Clerk Supreme Court of the United States *Guide for prospective indigent petitioners for writs of certiorari* Washington DC October 2000, 1.

190 B Barrow 'The discretionary appeal: A cost effective tool of appellate justice' (1988) 11 *George Mason University Law Review* 31, 41–42.

- ?? that is dependent upon a rule of law of importance to future litigants and which has not been previously announced, is unclear, or is in conflict with another rule, or
- ?? the resolution of which has an important effect on society because of its economic, governmental or other broad societal aspects.<sup>191</sup>

### ***Supreme Court of Canada***

4.188 The Supreme Court of Canada is Canada's final court of appeal with a jurisdiction including both the civil law of the Province of Quebec and the common law of the other provinces and territories. The Court's appellate jurisdiction, which is set out in the *Supreme Court Act RSC 1985 (Can) (C S-26)*, is made up of three different strands, namely appeals as of right, appeals with leave of a provincial court or of the Federal Court of Appeal, and appeals with leave of the Supreme Court.

4.189 Appeals as of right can be taken from a decision of the Federal Court of Appeal in a controversy between Canada and a province or between two or more Provinces,<sup>192</sup> or from an opinion of the highest court of a province on any matter referred to it by the Lieutenant Governor in Council of that province.<sup>193</sup>

4.190 Leave to appeal can be granted by the court of final resort in a province from a final judgment of that court. Such a court must form the opinion that the issue in question is one 'that ought to be submitted to the Supreme Court for decision'.<sup>194</sup> An appeal to the Supreme Court can be brought with the leave of the Federal Court of Appeal from a final judgment of the Federal Court where the Federal Court believes that the issue involved in the appeal should be sent to the Supreme Court for decision.<sup>195</sup>

4.191 There is also provision to allow an appeal to the Supreme Court from judgments of the Federal Court trial division, rather than the Federal Court of Appeal, or from a provincial court not being the final court of that Province.<sup>196</sup> In effect, this leap-frogging procedure by-passes the Federal Court of Appeal or the court of final resort in a province. There are several matters that must be satisfied prior to the matter coming before the Supreme Court in this way.<sup>197</sup>

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191 id, 54.

192 s 35.1.

193 s 36.

194 s 37.

195 s 37.1.

196 s 38.

197 s 38.

4.192 Section 40 of the *Supreme Court Act* sets out the provisions for appeals with leave of the Supreme Court. An appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the court of final resort in a province where, in relation to the particular matter sought to be appealed

the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

**Question 4.18.** Are there any aspects of the leave processes for the United States Supreme Court, other United States courts of last resort, or the Canadian Supreme Court that merit adoption in relation to the High Court of Australia?

### Criteria for granting or refusing special leave to appeal

4.193 In determining whether or not to grant special leave to appeal, the High Court is exercising its original and not its appellate jurisdiction. In deciding whether or not to grant a special leave application, the High Court exercises a broad discretion, guided by the non exhaustive criteria stipulated in s 35A JA. The High Court has considered the scope of this discretion over the course of the past 16 years and has developed a substantial jurisprudence on the subject.

#### *Granting special leave*

4.194 The hallmark of most successful applications for special leave is that they raise a question of law of public importance. Generally, they are cases that raise the question of how a principle of law should be formulated rather than how that principle should be applied.<sup>198</sup>

4.195 Conflicting decisions in different courts may justify a grant of special leave. Yet the existence of such a conflict may fail to justify a grant of special leave if the High Court considers the decision under challenge to be correct or not attended with sufficient doubt to warrant reconsideration. Courts may need to take steps within their own jurisdictions to resolve such conflicts, for example, by convening a court of five judges.<sup>199</sup>

<sup>198</sup> As Sir Anthony Mason points out, this is not to say that in exceptional circumstances an application of principle to the facts might not qualify for special leave. In some cases, this application of principle to a fact situation might give much needed guidance to other courts. See for example *Louth v Diprose* (1992) 175 CLR 621; A Mason 'The regulation of appeals to the High Court of Australia: The jurisdiction to grant special leave to appeal' (1996) 15 *University of Tasmania Law Review* 1, 11.

<sup>199</sup> *id.*, 15.

4.196 A judgment of an intermediate appellate court may also warrant consideration in the interests of the administration of justice. This ground is not confined to cases that raise questions concerning the maintenance of procedural regularity but can apply to an error that affects the administration of justice generally or in the particular case.<sup>200</sup> While the High Court is primarily concerned with the function of legal development, the interests of the administration of justice, either generally or in the particular case, are specifically referred to as a relevant factor in s 35A(b) JA. Such factors will be particularly important in criminal cases where the defendant's liberty is at stake.

### ***Grounds for refusal***

4.197 As O'Brien has indicated, for the most part the case law focuses not upon the reasons for granting special leave but on the reasons for refusing it.<sup>201</sup> This follows from the wide discretion afforded to the High Court by s 35A and from the High Court's general practice of not publishing its reasons for granting special leave, but only for refusing it.

4.198 The reasons for declining special leave to appeal include the following<sup>202</sup>

- ?? the judgment appealed from is correct or not sufficiently doubtful
- ?? the appeal is unlikely to succeed
- ?? the appeal turns on a question of fact
- ?? the appeal does not involve a question of law of sufficient public importance
- ?? the case has little or no relevance beyond the parties to the dispute
- ?? the case is not a suitable vehicle for the resolution of the legal issue
- ?? an appeal is not in the interests of justice
- ?? the appeal is against an interlocutory order, and
- ?? the appeal challenges a previous decision of the High Court and there is insufficient reason to reconsider that decision.

### **The role of oral argument**

4.199 The procedure for applying for special leave to appeal is provided by O 69A HCR. The Rules are designed to identify the special leave issues in advance of the hearing.<sup>203</sup> The Rules provide that an application for special leave shall be instituted by filing an application form<sup>204</sup> within 28 days after the judgment below

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200 *ibid.*

201 D O'Brien *Special leave to appeal* LBC Sydney 1996, 3.

202 *id.*, 55–120.

203 D Jackson 'Practice in the High Court of Australia' (1997) 15 *Australian Bar Review* 187, 193.

204 O 69A r 2 HCR. The application is to be lodged in the registry of the state or territory in which the proceedings in the court below were instituted.

was pronounced.<sup>205</sup> The application is to set out the parts of the judgment appealed from, the grounds of appeal and the orders sought if the appeal is successful.<sup>206</sup>

4.200 The applicant must next file and serve a summary of argument and a draft notice of appeal on any party who filed a notice of appearance. They are the principal documents from which the court forms an impression of the case.<sup>207</sup> Pursuant to O 69A r 9, the applicant is given the opportunity to file an argument in reply. Applicants' and respondents' summaries of argument are not to exceed ten pages in length and replies are not to exceed five pages.<sup>208</sup>

4.201 When the special leave application is listed for hearing, the party or a legal representative of the party may present an oral application. These oral arguments are limited in time. The applicant and respondent are allowed 20 minutes each with the applicant given a further five minute reply to the respondent's argument.<sup>209</sup> There is provision for the Court to extend this time as it thinks fit. A party may elect not to present an oral argument, in which case the Court may consider the party's case on the basis of the summary of argument.

4.202 One of the major purposes of the requirement of written submissions and of imposing time limits on the parties' oral argument was to reduce the amount of time needed for hearing special leave applications. Yet, despite these procedures, the growth in the number of civil special leave applications has imposed a mounting burden on the High Court. The Court's Annual reports provide data on the number of hearing days for special leave applications as a percentage of total sitting days for the Court as follows: 1996 – 25%; 1997 – 26%; 1998 – 19%; 1999 – 18%; 2000 – 24%.<sup>210</sup> In fact, these figures underestimate the proportion of the Court's time spent hearing applications for special leave. In recent years the Court has introduced the practice of hearing special leave applications in the lay weeks between Canberra sittings. These are not formally part of the special leave days set down in the High Court calendar as recorded in annual reports. This new practice consists of a half day every fortnight, or up to 10 extra special leave days per year. The Court is thus still faced with the issue of dealing with a very large number of applications for special leave, which affects the time available to hear other matters and to prepare judgments.

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205 O 69A r 3.

206 Sch 1 Form 61.

207 D Jackson 'Practice in the High Court of Australia' (1997) 15 *Australian Bar Review* 187, 194.

208 O 69A r 8, r 9(2).

209 O 69A r 11. As Sir Harry Gibbs points out, it is essential for counsel to bring out clearly and quickly the points of importance in the case. The qualities of clarity, succinctness and relevance are of particular importance. H Gibbs 'Appellate procedures in the High Court' (1986) 2 *Australian Bar Review* 1, 5.

210 These figures are based on the court sitting dates given in the High Court Annual reports. It has been assumed that dates listed are full day hearings and where special leave hearing dates overlap with regular sitting dates, these are taken as special leave application hearing dates only: High Court of Australia *Annual report 1996–97*, 58; High Court of Australia *Annual report 1997–98*, 13, 14; High Court of Australia *Annual report 1998–99*, 11–13; High Court of Australia *Annual report 1999–2000*, 7–8.



4.203 One option to reduce the time taken to deal with special leave applications would be for the Court to dispense with oral argument altogether or have the discretion to allow oral argument only if, for example, the complexity of the case or the level of public interest involved required it.<sup>211</sup> In response it might be said that the presentation of oral argument is an integral part of an applicant's access to justice and that oral argument significantly helps to bring out the 'special leave points', if any.

### ***Comparative approaches to oral argument***

4.204 In the United States Supreme Court, once all the documents have been filed for petition for a writ of certiorari, the Supreme Court considers the papers and makes an appropriate order, including summary disposal on the merits (rule 16(1)) or granting a petition for a writ of certiorari (rule 16(2)). In the latter case, the matter is then set down for oral argument. According to the Court's guidelines, cases selected for oral argument usually involve the interpretation of the United States Constitution or federal law, where at least four of the nine justices have selected the case as being of such importance that the Court must resolve the legal issues.<sup>212</sup> In relation to disposal of cases, plenary review with oral argument by attorneys is granted in about 100 cases per year and formal written opinions are delivered in 80–90 cases.<sup>213</sup>

4.205 The Supreme Court of Canada has a discretion as to whether to order an oral hearing to determine an application for leave to appeal. Section 43(1) of the *Supreme Court Act* provides that applications for leave to appeal are made to the Court in writing. After considering the documents filed, the Court either

- ?? grants the application if it is clear from the written material that it does not warrant an oral hearing and that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court, or is, for any other reason, of such a nature or significance as to warrant decision by it: (s 43(1)(a)), or
- ?? dismisses the application if it is clear from the written material that it does not warrant an oral hearing and that there is no question involved as set out in paragraph (a) above (s 43(1)(b)), or
- ?? orders an oral hearing to determine the application in any other case (s 43(1)(c)).

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211 A Mason 'The regulation of appeals to the High Court of Australia: The jurisdiction to grant special leave to appeal' (1996) 15 *University of Tasmania Law Review* 1, 21; A Mason 'The evolving role and function of the High Court' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 122.

212 <[www.supremecourtus.gov](http://www.supremecourtus.gov)> (16 October 2000).

213 *ibid.*

**Question 4.19.** Should the High Court generally determine applications for special leave to appeal on the basis of the written papers, without oral argument? If so, in what circumstances is oral argument nevertheless justified?

### Providing written reasons

4.206 At the time the 1984 amendments to the *Judiciary Act* were framed it was decided that the provision of full reasons for special leave determinations would be onerous and oppressive and defeat one of the objects of the amendments, that being to lessen the work load of the High Court.<sup>214</sup>

4.207 However, given the importance of special leave applications both to litigants and to the administration of justice, it is appropriate to consider whether a shorter form of reasons should be provided — perhaps a brief memorandum of decision, say of one page. Such a change might increase the openness and accountability of the process and aid litigants and the public in understanding the reasons for decisions. The argument for increasing the openness of the process in this way would be particularly strong if there were a move away from oral argument towards determining special leave applications on the basis of the papers. It might be possible for the Court to develop precedents for reasons for decision to reduce the time necessary to provide written reasons.

4.208 Writing of the American courts, Barrow argues that reasons for denial are a critical step in the discretionary leave process and should be clearly stated to ensure that the appellate court is carrying out its appropriate function and is properly applying the applicable criteria to its decision.<sup>215</sup> He adds that the reasons should not be broad, general explanations but should specifically deal with the case at hand, in most instances stating only the rule applicable in the case and why it is applicable.

4.209 However, there may be significant difficulties in the High Court providing written reasons for the grant or refusal of special leave to appeal. A short form of written reasons would have to be prepared in advance because parties to special leave generally desire an answer to be given at the time of hearing. If matters were reserved to prepare written reasons, this would add significantly to the Court's workload. The requirement of short written reasons might only be acceptable if it were combined with the practice of determining special leave applications on the papers.

214 A Mason 'The regulation of appeals to the High Court of Australia: The jurisdiction to grant special leave to appeal' (1996) 15 *University of Tasmania Law Review* 1, 5.

215 B Barrow 'The discretionary appeal: A cost effective tool of appellate justice' (1988) 11 *George Mason University Law Review* 31, 52.

**Question 4.20.** Should the High Court provide short form written reasons for the grant or refusal of applications for special leave to appeal? If so, should this be linked to any move to determine applications on the papers?

### **The number of judges to determine applications**

4.210 Section 21 JA provides that applications for special leave may be heard and determined by a single justice or by a Full Court. Under s 19 JA, a Full Court may be constituted by two or more justices. It is the current practice for the Court to be constituted by two justices when hearing most applications for special leave to appeal in civil and criminal cases. In the past, the usual practice was for special leave applications to be heard by three justices in civil cases, five justices in criminal cases, and seven justices in cases of particular importance.<sup>216</sup>

4.211 Sir Anthony Mason has suggested that one option to consider in dealing with the High Court's special leave workload is to increase the number of justices appointed to the Court from seven to nine.<sup>217</sup> He comments that such a move would provide a larger judicial pool to share the special leave applications. However, he considers it doubtful that this course would significantly reduce the workload of individual justices, unless the Court adopted the practice of publishing a single majority and single minority judgment, a practice that has not commended itself to the Court thus far. As discussed in paragraph 4.267, there are other general concerns about seeking to increase the number of judicial appointments to deal with growing workloads.

4.212 Another option in relation to special leave applications would be to reduce the number of justices who hear such matters, possibly to a single justice in civil matters. Such a change would not itself require legislative amendment as s 21 JA currently allows special leave applications to be determined by a single justice.

4.213 However, if such a course were adopted it would seem desirable to amend s 34 JA to qualify the right of appeal that currently lies from a judgment of a single justice of the High Court exercising original jurisdiction to a Full Court. Were this not done, it would be possible to challenge every decision to grant or refuse special leave, and thereby negate the benefits accruing from a streamlined procedure.

<sup>216</sup> H Gibbs 'Appellate procedures in the High Court' (1986) 2 *Australian Bar Review* 1, 9.

<sup>217</sup> A Mason 'The evolving role and function of the High Court' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000, 122.

4.214 This course is likely to reduce the workload of the Court in relation to special leave applications but it might be argued that it would be contrary to public perceptions of fairness for one justice to make an important decision about access to the final court of appeal. Further, it could be argued that hearings by more than one justice can assist in achieving greater consistency in approach and enable justices to collaborate in delivering an appropriate outcome.

### *Comparative approaches to size of panel*

4.215 In Canada, applications for leave to appeal are considered by three judges. Section 43(3) of the *Supreme Court Act RSC 1985* (Can) (C S-26) provides that any three judges of the Court constitute a quorum for the consideration and determination of an application for leave to appeal, whether or not an oral hearing is ordered. There is an exception in s 43(4), where five judges constitute a quorum in the case of an application for leave to appeal from a judgment of a court quashing a conviction for an offence punishable by death or dismissing an appeal against an acquittal of an offence punishable by death.

4.216 In the United States Supreme Court, applications for certiorari are considered by the entire Court of nine justices and may be set down for oral argument if at least four justices of the Court identify the matter on the papers as being important enough for oral hearing.<sup>218</sup>

**Question 4.21.** How many justices should determine a special leave application in a civil matter? Should this number vary depending on the nature and subject matter of the intended appeal?

### **Access to a second appeal — the Family Court exception to the High Court’s special leave requirement**

4.217 This section of the Chapter considers an important exception to the High Court’s special leave requirement, namely, appeals by certification of the Family Court pursuant to s 95(b) FLA. Underlying the special leave requirements of the High Court is the policy that no litigant should have access to a second appeal as of right. This view reflects the public interest in the High Court’s role as the ultimate court of appeal on all matters of Australian law. If such a view is accepted, then any exception to the special leave requirements must be justified from a public interest perspective.

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218 <[www.supremecourtus.gov](http://www.supremecourtus.gov)> (16 October 2000).

**Section 95(b) certificates from the Family Court**

4.218 Section 95 FLA provides as follows

Notwithstanding anything contained in any other Act, an appeal does not lie to the High Court from a decree of a court exercising jurisdiction under this Act, whether original or appellate, except:

- (a) by special leave of the High Court; or
- (b) upon a certificate of a Full Court of the Family Court that an important question of law or of public interest is involved.

4.219 Section 95 FLA thus allows an appeal to be taken to the High Court from a decree of a Family Court, whether in the exercise of original or appellate jurisdiction, ‘upon a certificate of a Full Court of the Family Court that an important question of law or of public interest is involved’.<sup>219</sup> This provision differs from the power of removal in s 40 JA in an important respect — it is premised on the existence of a final decision of the Family Court but enables the usual special leave requirements of the High Court to be by-passed (see Chapter 3). As such, s 95(b) FLA constitutes ‘a unique power so far as intermediate appellate courts are concerned in this country’.<sup>220</sup>

4.220 There is no clear explanation for the existence of the provision. In *Laing v Director General, Department of Community Services New South Wales*, Nicholson CJ noted that there was no material available to explain the inclusion of s 95(b) in the *Family Law Act* but he speculated that

it must be that because of the specialist nature of this court and the limited number of family law cases that were likely to come before the High Court, the legislature considered that the Full Court of this Court would in some circumstances, have a high degree of awareness of what were important questions of law or public interest in the family law area.<sup>221</sup>

4.221 Another possible interpretation is that s 95 was introduced in recognition of the fact that the *Family Law Act 1975*, when originally enacted, contained many significant, and in some areas, controversial changes to family law, including ‘no fault’ divorce and the establishment of the Family Court. Section 95 allowed a convenient mechanism for the Full Court to refer on appeal significant issues of law to the High Court in the context of a substantially new system of family law, where there was no established jurisprudence. Such a provision could be particularly useful where, as in *Laing*, there is considerable disagreement in the decisions of the judges of the Full Court about a principle of law.<sup>222</sup> The Full Court

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219 The current section is identical to its form as originally enacted, save for a minor amendment by the *Family Law Amendment Act 1976* (Cth) s 32.

220 *Laing v Director General, Department of Community Services New South Wales* (1999) 24 Fam LR 623, 627 (Nicholson CJ).

221 *ibid.*

222 *id.*, 626 (Nicholson CJ).

of the Family Court has referred to a lack of a clear majority view to guide 'profound' questions as a significant factor in determining whether a certificate should be granted.<sup>223</sup> A further explanation for the existence of s 95(b) is that an appeal by way of special leave is dependent on the willingness of one of the parties to take the matter higher. A certificate, on the other hand, allows an important question to be determined by the High Court at the motion of the Full Court of the Family Court.

### The early approach to s 95

4.222 Before its 1999 decision in *Laing*, the Family Court took a conservative approach to s 95. For example, in *Re Z (No 2)* the majority of the Full Court refused an application to grant a certificate under s 95(b) on the basis that

to grant a certificate is a serious step, which effectively usurps the High Court's discretion and detracts from its capacity to determine for itself, the matters which it considers significant for the function and development of the law as seen from the position of the highest court in the land.<sup>224</sup>

4.223 The majority suggested that the following three components would 'usually be present' in granting a certificate:

- ?? the absence of a clear ratio
- ?? the issues at stake meet the language of s 95(b) (that is there must be an important question of law or of public interest), and
- ?? the issue must be live rather than moot or hypothetical.<sup>225</sup>

4.224 In *Re Evelyn (No 3)*,<sup>226</sup> the Full Court of the Family Court held that a s 95(b) certificate should not be granted, even if a liberal interpretation of the section were adopted, where the High Court is currently considering the same or a similar issue in another case.

### The Full Court's new approach to s 95

4.225 In 1999, the Full Court of the Family Court most recently granted a certificate in *Laing*,<sup>227</sup> a case that significantly expanded the scope for granting certificates. In *Laing* Nicholson CJ (Moore and May JJ concurring) said that the earlier approach represented in *Re Z (No 2)* was 'too restrictive'. Section 95 'must

223 *Re Z (No 2)* (1996) 20 Fam LR 743, 748 (Nicholson CJ and Frederico J).

224 *id.*, 748 (Nicholson CJ and Frederico J), Fogarty J in dissent (at 750) argued that such a conservative focus on the existence of special leave and the seriousness of pre-empting the High Court left little purpose in the continued existence of s 95(b).

225 *id.*, 749 (Nicholson CJ and Frederico J).

226 (1998) 23 Fam LR 667.

227 *Laing v Director General, Department of Community Services New South Wales* (1999) 24 Fam LR 623.

be given its ordinary meaning,’ so that the question to be determined in an application under s 95(b) is simply ‘whether the outcome of the case leaves to be determined any important questions of law or public interest’.<sup>228</sup>

4.226 Nicholson CJ stated that the restrictive view expressed in *Re Z (No 2)* was inconsistent with the majority view of the High Court in *CDJ v VAJ* where McHugh, Gummow and Callinan JJ stated that

a provision conferring judicial power upon a court should be construed liberally and without the making of implications or the imposition of limitations not found in the words used by the legislature.<sup>229</sup>

4.227 In *Laing*, Kay J also expressed approval of a more liberal interpretation of s 95(b) expressing a preference for the view that the Full Court

should not be unduly restrained in granting certificates where it perceives that an important question of law or of public interest is involved, and there is some uncertainty in the outcome of the case because of the manner in which such a question has been determined.<sup>230</sup>

4.228 Kay J determined, however, that even on such a broader test the instant case did not raise any important question of law or public interest to warrant the grant of a certificate and so dissented on the application of the broader test.

4.229 Finn J, in dissent, while not drawing a firm conclusion on whether s 95 had been construed too narrowly in the past, stated that ‘particular weight’ had to be given to the fact that the High Court should have ‘the opportunity to decide for itself whether it should entertain the matter’ and ‘the discretion and...capacity to determine for itself, the matters which it considers significant for the function and development of the law as seen from the position of the highest court in the land’. Finn J said that of particular importance in that case was that the applicant’s case had already been the subject of an unsuccessful application for special leave to appeal to the High Court at an earlier date and that in the course of that application the relevant argument had been brought, albeit briefly and without elaboration, to the attention of the High Court, which was apparently not moved by those considerations.<sup>231</sup>

4.230 The apparent difference in approach between the High Court in refusing the earlier special leave application and the majority of the Full Court in *Laing* in granting a certificate demonstrates that different assessments can be made by the Family Court and the High Court about the public importance of an appeal. One

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228 id, 628 (Nicholson CJ).

229 (1998) 157 ALR 686, 709.

230 (1999) 24 Fam LR 623, 633 (Kay J).

231 id, 630 (Finn J).

view is that this difference in approach highlights the fact that the certification procedure interferes with the High Court's capacity to determine its appellate case load. The alternative view is that it demonstrates the value of the procedure by allowing the Full Court of the Family Court to receive guidance from the High Court on issues that the High Court in the special leave process may be unwilling to deal with fully.

4.231 There is little guidance on what is meant by 'important question of law or public interest' beyond the fact that these words are to be given their ordinary meaning. Nicholson CJ put forward a technical argument in *Laing* that the test under s 95(b) is a broader test than is contained in s 35A JA, which is concerned with special leave to appeal. Section 95(b) allows the granting of a certificate where an important question of 'public interest' is involved. Section 35A, on the other hand, authorises special leave to appeal where a question of law is of 'public importance', that is, 'public importance' is made referable to a question of law and does not exist as a separate ground of appeal of itself.<sup>232</sup>

### The High Court's response

4.232 The High Court considered the certificate issued by the Full Court of the Family Court in *Laing* in its decision in *DJL v Central Authority*.<sup>233</sup> Four justices in a joint judgment (Gleeson CJ, Gaudron, McHugh and Gummow JJ) expressed considerable doubt about the constitutionality of s 95(b).

4.233 Their Honours noted that the decision that a certificate be granted was implemented by a formal order of the Full Court of the Family Court.<sup>234</sup> The appellant had conceded in oral argument before the High Court that this order itself would attract the operation of s 73 of the Constitution. This raised the issue of whether the requirement of a certificate under s 95(b) was a permissible 'regulation' of the right of appeal protected by s 73.<sup>235</sup> The respondents in the case did not argue the contrary, with the result that for the purposes of the case the Court merely assumed the validity of s 95(b) in relation to s 73.<sup>236</sup>

4.234 Their Honours said that the construction of s 95 should be approached keeping in mind the observations made by the High Court in *Willocks v Anderson*,<sup>237</sup> a case in which regulations made under the *Apple and Pear Organization Act 1938* (Cth) purported to confer original jurisdiction on the High Court. The High Court held that the Act did not contemplate that jurisdiction might be conferred on the Court by regulation.

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232 id, 627–628 (Nicholson CJ).

233 (2000) 170 ALR 659.

234 id, 663.

235 id, 665.

236 *ibid*.

237 (1971) 124 CLR 293.



Under the Constitution this court is entrusted with the most important of judicial functions. To confer additional original jurisdiction upon it may well impair its ability to discharge its major functions with dispatch. The question whether in any particular circumstances, original jurisdiction should be conferred on this court is of such great significance as to warrant the careful attention of the parliament. Even if the power to do so may be validly delegated to the Governor-General it is not a matter to be left to the initiative of the Executive except after the attention has been given to the question by the parliament. If after such consideration the parliament for reasons sufficiently compelling in a particular case should decide to delegate the power, its intention to do so should be expressly and clearly stated.<sup>238</sup>

4.235 In keeping with the reasoning in *Willocks v Anderson*, their Honours considered that s 91 of the *Matrimonial Causes Act 1959* (Cth), which had allowed a court to state a case for the opinion of the High Court and thereby confer original jurisdiction upon the High Court, was of questionable validity. By analogy, their Honours considered that there was some doubt about the validity of the current s 95, in so far as it engaged the appellate jurisdiction of the Court under s 73 of the Constitution. To demonstrate validity, it would be necessary to argue that the requirement under s 95 to grant a certificate involves ‘regulation’ within the meaning of s 73 of the Constitution.<sup>239</sup>

4.236 Their Honours also said that it was ‘unsatisfactory’ in the case before them for the certificate to do no more than repeat the statutory criteria, namely ‘an important question of law or of public interest’. They held that

[t]he certificate should specify the terms of that important question. It should also state whether that question is one of law or of public interest or both. The apparent object of s 95(b) will then be achieved. This is to obviate the necessity for a grant of special leave by the High Court limited to a ground perceived by the High Court, on the special leave application, to be an important question of law or of public interest.<sup>240</sup>

4.237 However, their Honours said that

[i]n the circumstances of this case, and in the absence of opposition and submissions as to what we would otherwise have regarded as the true construction of s 95(b), we are prepared to accept the order granting the certificate be benevolently construed.<sup>241</sup>

4.238 Kirby and Callinan JJ expressed different views on these points. Kirby J said that in his view a valid foundation for s 95 exists. His Honour explained that a s 95 certificate ‘is not in some way alien to the judicial power of the Commonwealth’ but a form of ‘regulation’ by the Parliament of the right of appeal which is contemplated. Kirby J also rejected the view that the granting of a certificate

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238 id, 299–300.

239 (2000) 170 ALR 659, 665.

240 *ibid.*

241 id, 666.

‘subverted’ or compromised the position of the High Court in the Australian judicial hierarchy.<sup>242</sup>

4.239 On the issue of the form of the certificate, Kirby J said that while it was desirable that the question found to warrant the grant of the certificate should be identified and stated in the document, that absence did not go to the validity of the certificate or the Court’s jurisdiction. There was nothing in s 95 that required the certificate to be in any particular form.<sup>243</sup>

4.240 Callinan J considered s 95 to be constitutionally valid because of the reasoning in *Smith Kline & French (Aust) Ltd v Commonwealth*,<sup>244</sup> which categorised an application for special leave to appeal as involving the exercise of judicial power.<sup>245</sup>

4.241 Callinan J said that it was unfortunate that the certificate did not identify with precision the important question of law or public interest involved, but the question was clear from the judgment of the Full Court of the Family Court. In any event, Callinan J was of the view that ‘the certificate, if issued, as this one was, in an unqualified way, had the effect of conferring upon the appellant an entitlement to appeal’.<sup>246</sup>

### Use of section 95(b)

4.242 Section 95 certificates have been granted in only four cases. The first, in 1980, concerned the extent of the powers of the Family Court to issue injunctions under s 114 FLA.<sup>247</sup> The second, in 1986, concerned the validity of the *Family Law Act*.<sup>248</sup> The third, in 1991, involved the ambit of parental power in relation to the sterilisation of children.<sup>249</sup> The fourth, in 1999, was *Laing* referred to above. Nor are many applications made for certificates to be issued under s 95. In 1999–2000, only one application was lodged under s 95(b), in comparison with 20 applications for special leave to appeal from the Family Court to the High Court.<sup>250</sup> This is indicative of the trend in applications for the past decade.<sup>251</sup>

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242 id, 680–682.

243 id, 683.

244 (1991) 173 CLR 194.

245 (2000) 170 ALR 659, 700.

246 id, 702.

247 *In the Marriage of Stowe (No 2)* (1980) 6 Fam LR 757.

248 *In the Marriage of Fisher (No 2)* (1986) 11 Fam LR 11.

249 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 385.

250 Family Court of Australia *Annual report 1999–2000*, 27.

251 Family Court of Australia *Annual report* various years.

4.243 These statistics suggest that litigants do not often apply to the Full Court to issue a certificate. When a certificate is sought, the Court issues certificates sparingly and apparently in cases that raise considerable public interest. However, it is possible that the number of applications made and the number of certificates granted might increase as a result of the more expansive approach to s 95(b) adopted by the Family Court in *Laing*.

### **Costs where a certificate is granted**

4.244 Section 95(b) makes no reference to the issue of costs. In relation to proceedings before the Family Court, the general rule under s 117 FLA is that each party to proceedings under the Act bears his or her own costs. The Court may make such orders as the court considers just, if it is of the opinion that there are circumstances that justify the making of an order for costs. Section 117 states that in considering orders for costs the Court shall have regard to

- ?? the financial circumstances of each party
- ?? any grant of legal aid
- ?? the conduct of the parties in the proceedings
- ?? whether the proceedings were necessitated by the failure of a party to comply with previous orders of the court
- ?? whether any party has been wholly unsuccessful in the proceedings
- ?? whether either party has made an offer in writing of settlement, and
- ?? such other matters as the court considers relevant.

4.245 In considering whether to make a costs order on an appeal, the Full Court of the Family Court currently applies the same section of the Act as is applied at first instance, namely s 117(1), (2) and (2A).<sup>252</sup> However, there are differences in approach when the proceeding is an appeal, mainly because an appeal is seen as an optional or additional procedure. The Full Court of the Family Court has often taken the view that a party who takes the additional step of appeal necessarily involves the respondent incurring substantial additional costs. This is a very significant consideration in deciding whether to make an order for costs on appeal, particularly where the appellant is unsuccessful. The court has tended to adopt the view, especially in appeals concerning property, that if the appeal is unsuccessful the respondent should receive a costs order, although the Court will consider all the factors listed in s 117.<sup>253</sup>

4.246 The situation as to costs changes if the matter comes to the High Court by way of a s 95(b) certificate. In *CDJ v VAJ (No 2)*<sup>254</sup> Kirby J said that costs in the High Court are not governed by s 117 FLA but by the broad powers conferred by

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252 Family Law Council *Family law appeals and review: An evaluation of the appeal and review of family law decisions* Commonwealth of Australia Canberra 1996, 17.

253 *ibid.*

254 (1998) 159 ALR 138.

s 26 JA, which provides that the High Court has jurisdiction to award costs in all matters brought before it, including matters dismissed for want of jurisdiction.

4.247 In the four cases in which a s 95(b) certificate has been granted, the appellant was ordered to pay the respondent's costs on one occasion<sup>255</sup> and the Commonwealth was ordered to pay both parties' costs on one occasion.<sup>256</sup> No orders as to costs were made on the other two occasions.<sup>257</sup>

4.248 The position regarding costs in relation to s 95(b) certificates may also be affected by the provisions of the *Federal Proceedings (Costs) Act 1981* (Cth). That Act provides for the partial or complete reimbursement of the costs of 'federal appeals' as defined under s 4 of the Act, including an appeal to the High Court from a judgment of the Family Court. The Act sets out the circumstances in which a costs certificate may be granted to either party. For example,

- ?? where an appeal succeeds on a question of law, the court that heard the appeal may, on the application of a respondent to the appeal, grant to the respondent a costs certificate in respect of the appeal (s 6(1)), and
- ?? where an appeal succeeds on a question of law and in accordance with s 117 FLA each party to the appeal bears his or her own costs, the court may grant the appellant a costs certificate in respect of his or her costs (s 9(1)).<sup>258</sup>

4.249 The effect of a costs certificate is to entitle the party to whom it has been granted to apply to the Attorney-General for payment in accordance with the Act. Under s 17, the Attorney-General may authorise the payment of costs up to the prescribed maximum — which in the case of the High Court is currently \$10 000.

4.250 A question that arises in the present context is whether s 95(b), if it is retained, should be amended to provide specifically for costs in relation to certificates, in so far as the provisions of s 117 FLA and the *Federal Proceedings (Costs) Act 1981* (Cth) are considered inadequate to do justice between the parties.

### Issues for consideration

4.251 A principal issue is whether s 95(b) FLA should be repealed. This issue requires a balancing between the need for the High Court to be able to determine its caseload and the desirability of an intermediate appellate court being able to seek the High Court's ruling on a central issue as expeditiously as possible.

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255 *DJL v Central Authority* (2000) 170 ALR 659.

256 *In the Marriage of Fischer* (No 2) (1986) 11 Fam LR 11.

257 *In the Marriage of Stowe* (No 2) (1980) 6 Fam LR 757; *Secretary, Department of Health and Community Services v JMB and SMB* (1992) 175 CLR 385.

258 For further circumstances, see also s 7A(1)), s 8(1), s 8(2), s10(2) and s10(3).

4.252 While the original rationale for the certification process is unclear, the main argument for its retention is that it serves a useful purpose in allowing the Full Court of the Family Court to exercise a discretion which, when properly exercised, can allow the High Court to make timely, authoritative decisions on significant points of law and public interest affecting family law. Fogarty J in *Re Z (No 2)* stated that certificates may be useful in cases where

[i]f the wider issues identified in the case stated are not authoritatively determined by the High Court it is inevitable that a series of difficult evidential and jurisdictional issues will arise in this Court at first instance with uncertainties as to the outcomes in those cases and the likelihood of a series of appeals some of which will inevitably be determined by the High Court.<sup>259</sup>

4.253 According to Fogarty J, a certificate may enable a matter to be determined by the High Court some months earlier than otherwise would be the case.<sup>260</sup> Such a power may be particularly useful in family law because that area of law arouses considerable public interest and affects a large section of the population. Moreover, the history of the use of the provision may suggest that it is used sparingly and appropriately and therefore does not unduly impinge on the High Court's management of its caseload. In *DJL v Central Authority*, Kirby J commented that the Full Court of the Family Court had made clear its recognition that, given the ordinary procedure and the functions and role of the High Court, a certificate under s 95(b) of the Act will rarely be granted.<sup>261</sup> It might also be argued that, since special leave is infrequently granted in family law matters, primarily because the jurisdiction involves the exercise of wide discretions, s 95 provides a useful mechanism for the High Court to consider important family law principles that it might not otherwise consider. However, such an argument perhaps assumes that the High Court is otherwise unable to identify adequately those cases that would be appropriate for its consideration.

4.254 The alternative view is that s 95 should be repealed because it is clearly inconsistent with the principle that the High Court, as Australia's court of last resort, should determine its own caseload. In the words of Nicholson CJ and Frederico J in *Re Z (No 2)*, granting a certificate 'effectively usurps the High Court's discretion and detracts from its capacity to determine for itself, the matters which it considers significant for the function and development of the law'.<sup>262</sup> Further, the relatively infrequent use of s 95(b) certificates suggests the provision is unnecessary. In addition, the High Court's special leave process provides an effective and expeditious mechanism for reviewing Family Court decisions. Moreover, as discussed in paragraphs 4.194–4.198, 4.230–4.231, in determining special leave applications the High Court must also consider similar issues to those

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259 (1996) 20 Fam LR 743, 750 (Fogarty J).

260 *ibid.*

261 (2000) 170 ALR 659, 683.

262 (1996) 20 Fam LR 743, 748.

considered by the Full Court of the Family Court under s 95(b) FLA, such as the public importance of the case. The potentially modest savings in time and costs offered by the s 95(b) certificate process do not outweigh the need for the High Court to control its own workload. A further possible argument for repeal is that the majority view of the High Court in *DJL v Central Authority*, without deciding the question, expressed doubt about the constitutionality of s 95(b). Finally, it could be argued that the disparity between the powers of the Family Court and other federal courts (which do not have such a power) cannot be justified.

4.255 At this stage, the Commission is inclined to the preliminary view that s 95(b) FLA, in so far as it creates a right of appeal, is unnecessary for the reasons stated and should be repealed.

4.256 However, if s 95(b) FLA were to be maintained, one question that arises is whether the same power should be given to the Federal Court or to state and territory Supreme Courts when exercising federal jurisdiction. In 1987, the Advisory Committee to the Constitutional Commission recommended that legislation be enacted to permit intermediate appellate courts to grant a certificate that, in that court's view (having regard to the importance of the issue or the frequency with which it has arisen), a particular case is one in which it is appropriate for the High Court to grant special leave.<sup>263</sup> Such a certificate would be a further factor to be taken into account by the High Court when exercising its discretion under s 35A JA. This procedure would have the advantage of enabling intermediate appellate courts to express their opinion about the desirability of a High Court determination while leaving the final decision on that question to the High Court.

4.257 One view is that reliance can be placed on the Federal Court and state and territory Supreme Courts, just as it can be placed on the Family Court, to use a power of certification appropriately and only to certify cases that clearly raise important questions of law and public interest. On the other hand, there is a strong argument that such a power impinges on the High Court's ability to control its caseload. Intermediate appellate courts may not be in a position to take proper account of the workload of the High Court or its priorities, both of which may be subject to considerable change.

4.258 If the power of certification were extended to other courts, the issue arises as to what test should be adopted in deciding whether to grant a certificate. The test currently embodied in s 95(b) FLA could be extended to the other courts or a different test could be adopted. One option is to adopt a test with more detailed statutory criteria which amplify the relevant factors such as public interest and public importance.

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263 Advisory Committee to the Constitutional Commission *Australian judicial system* Commonwealth of Australia Canberra 1987, 55–56.

4.259 If the provision is retained, a further issue is whether legislation should specify the form and content of the certificate and what powers the High Court has in relation to a certificate granted by the Family Court. For example, the legislation might empower the High Court to revoke a certificate or vary its terms.

**Question 4.22.** Should s 95(b) of the *Family Law Act* be retained, or should it be repealed to provide parity with other federal courts, which do not have such a power? What impact, if any, should the High Court's recently expressed doubts about the constitutionality of the provision have on this issue?

**Question 4.23.** If s 95(b) of the *Family Law Act* were retained, should the criteria for granting a certificate under s 95(b), namely 'that an important question of law or of public interest is involved', be amended in any way? If so, how?

**Question 4.24.** If s 95(b) of the *Family Law Act* were retained, is there a need to make specific provision on the issue of costs in relation to cases involving certificates under s 95(b)? If so, what should be provided?

**Question 4.25.** If s 95(b) of the *Family Law Act* were retained, is any change necessary to s 95(b) in relation to the form or content of a certificate, such as the nature of information provided about the important question of law or public interest involved?

**Question 4.26.** If s 95 of the *Family Law Act* were retained, should the Federal Court and state and territory Supreme Courts have a similar power?

**Question 4.27.** Should intermediate appellate courts be given the power to grant a certificate stating that a particular case is appropriate for the grant of special leave by the High Court, with such a certificate then being taken into account by the High Court in considering an application for special leave under s 35A of the *Judiciary Act*. If so, should such a process be confined to matters of federal jurisdiction or extend to all matters, federal and state, that are amenable to High Court appeal?

## **The structure of intermediate appellate courts**

4.260 This section examines certain aspects of the structure of the Full Court of the Federal Court and the Full Court of the Family Court. This discussion is focuses on federal courts but considers some examples of the structure and composition of

state courts, where relevant. As discussed in Chapter 2, the Commonwealth Parliament has no power to alter the structure or organisation of state courts when investing them with federal jurisdiction.

4.261 Different structures and compositions of appellate courts can impact upon the exercise of their appellate jurisdiction and the effective management of a growing appellate caseload. A full analysis of the appellate structures and the constitution of the Full Court of the Family Court and the Full Court of the Federal Court is beyond the scope of this inquiry. The following discussion is limited to considering whether the Federal Court and the Family Court, when functioning as intermediate appellate courts, should be established as permanent appellate courts with dedicated judges of appeal or as bodies formed from the pool of trial judges who sit on appeals in rotation.

4.262 A fundamental distinction in the organisation of appellate courts is whether they are constituted as permanent courts with specialised judges of appeal, or whether the appellate bench is formed from the general pool of trial judges sitting in rotation. There are three basic models for the structure of an appellate court, as follows.

?? Rotating membership. This is the model used by the Federal Court, which does not have a permanent appellate court but instead re-constitutes its appellate court on each occasion from its general pool of trial judges. The Chief Justice of the Federal Court is responsible for the establishment of its appeals benches pursuant to his or her obligation to ensure ‘the orderly and expeditious discharge of the business of the Court’ (s 15(1) FCAA). As at 30 June 2000 there were 50 Federal Court judges.<sup>264</sup> Full Federal Court sittings are scheduled periodically throughout the year. In 1997–98, the Court developed a new Full Court rostering system to increase the national Full Court sittings from three to four. These sittings are each of four weeks duration.<sup>265</sup> Other Australian courts that use rotating membership are the Supreme Courts of Western Australia, South Australia and Tasmania.<sup>266</sup>

?? Permanent judges of appeal. Under this model, appellate work is carried out exclusively by judges of appeal, who do no routine trial work. There are currently no intermediate federal courts that follow this model. However, the Courts of Appeal of New South Wales and Victoria are constituted in this fashion.<sup>267</sup>

264 Federal Court *Annual report 1999–2000*, 3.

265 Federal Court *Annual report 1997–98*, 12; Federal Court *Annual report 1999–2000*, 42. See also ALRC 89, para 7.28.

266 See eg *Supreme Court Act 1935* (WA) s 7; *Supreme Court Act 1935* (SA) s 7.

267 See M Kirby ‘Permanent appellate courts: The debate continues’ (1988) 4 *Australian Bar Review* 51–66, M Kirby ‘Permanent Appellate Courts: The New South Wales Court of Appeal twenty years on’ (1987) 61 *Australian Law Journal* 391–405.



?? Hybrid model. The Family Court uses a hybrid model, combining the permanent and rotation models of an appellate court. Its appellate court is comprised partly of an Appeals Division of permanent appellate judges, and partly by judges from its General Division, who ordinarily hear cases at first instance but also sit on appeals in rotation.<sup>268</sup> Such appeals as lie to the Family Court are generally heard by a Full Court.<sup>269</sup> However, 'Full Court' means '3 or more Judges of the Family Court sitting together, where a majority of those Judges are members of the Appeal Division'.<sup>270</sup> The Appeal Division is constituted by the Chief Justice, the Deputy Chief Justice and no more than six other judges appointed to the Appeal Division.<sup>271</sup> This hybrid model is adopted in some intermediate state courts, such as the New South Wales Court of Criminal Appeal and the Queensland Court of Appeal.

4.263 There are different views about the value of permanent appellate courts and their impact on appellate case management. Arguments supporting their establishment include the following.<sup>272</sup>

- ?? Appellate work usually involves functions and skills that are different in kind from those performed by trial judges and this can be reflected in permanent appointment to an appellate court.
- ?? The perceived quality and prestige of permanent appellate courts are likely to attract judges of the highest calibre.
- ?? A permanent court recognises the fact that such a body will in fact be the final court for the vast number of cases coming to it. A specialist and highly experienced court is therefore desirable.
- ?? A permanent appellate court allows judges to develop skills in the efficient disposition of appellate cases, including trying new practices and procedures.<sup>273</sup>
- ?? A smaller, defined group of appellate judges operating in repeated interaction with each other makes it easier to develop a coherent, logical and systematic body of legal principle. Coordinated efforts may reduce the number of appeals and increase the ability of legal practitioners to forecast decisions of the court.<sup>274</sup>

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268 The earliest appointments to the Appeal Division were temporary appointment of trial judges.

269 s 94 FLA.

270 s 4 FLA.

271 s 22 (2AA), s 22 (2AC) FLA.

272 See generally M Kirby 'Permanent appellate courts: The debate continues' (1988) 4 *Australian Bar Review* 51–66, M Kirby 'Permanent appellate courts: The New South Wales Court of Appeal twenty years on' (1987) 61 *Australian Law Journal* 391–405.

273 P Young 'Current topics' (1995) 69 *Australian Law Journal* 566.

274 D Ipp 'Reform to the adversarial process in civil litigation: Part II' (1995) 69 *Australian Law Journal* 790, 812.

- ?? A permanent court avoids the administrative and practical problems that may arise from a rotation of judges where a judge's availability for appellate work may be interrupted by lengthy trial work, possibly on circuit.
- ?? A permanent appellate court might allow appellate judges to have a measure of independence from those judges whose decisions they review. This may not be possible to the same extent with a rotating appellate membership, where judges might feel constrained in reviewing decisions of their peers, knowing that they will in turn be reviewed by those they judge.

4.264 Arguments in favour of appellate courts having a rotating membership of trial judges include the following.

- ?? Allowing judges to sit on appeals and trials encourages judges to be aware of the circumstances relevant to each level. This dual experience may assist appellate courts in making decisions that do not unnecessarily impede the efficient conduct of trials. Trial judges might also become more aware of trial errors identified by appellate courts so that the number of appeals may be minimised.<sup>275</sup>
- ?? Drawing on a general pool of trial judges to constitute appeal benches improves judicial collegiality and job satisfaction.
- ?? Such a system, if properly organised, can increase the administrative flexibility in the system by allowing the court to respond quickly to particular changes in its trial and appellate workload. For example, under a rotating system there are fewer limitations on the number of panels that can be constituted concurrently, which is an important factor in reducing delays in appellate cases. The establishment of a permanent appellate court may reduce the number of appeals that may be heard simultaneously.

4.265 One issue that needs to be considered is whether in practice a rotating membership model, such as that used by the Federal Court, has created problems in ensuring consistency in approach and outcome between different panels drawn from a pool of judges. On the other hand, the rotating model would seem likely to increase the degree of judicial collegiality, which can have benefits for case management, judicial education, and productivity.

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275 P Young 'Current topics' (1995) 69 *Australian Law Journal* 566.

**Question 4.28.** Should the appellate structure of the Federal Court or the Family Court be changed? In particular, should either or both conform to any of the following models, and if so, why

- (a) appeals heard by a court comprised solely of judges of appeal, who hear appeals only.
- (b) appeals heard by a court comprised of judges of appeal, in combination with trial judges sitting in rotation.
- (c) appeals heard by a court comprised entirely of trial judges sitting in rotation?

### **The composition of intermediate appellate courts**

4.266 This Chapter has already discussed the large and increasing appellate workload of the Federal Court and the Family Court. One area to consider in efforts to deal efficiently with growing workloads is the number of appellate judges and the composition of appellate benches.

4.267 One approach to dealing with the increase in appellate workload is simply to increase the number of judicial appointments to those courts. Governments have shown a reluctance to increase significantly the number of judicial appointments. Increasing the number of judges is likely to be impractical as a long-term solution to case workload for the following reasons:

- ?? the cost of making additional appointments
- ?? the devaluation of the status and quality of appointments
- ?? the threat to the development of a coherent body of law
- ?? the risk of inconsistency or internal conflict within the court, and
- ?? the loss of collegiality and institutional coherence.<sup>276</sup>

4.268 Some states appoint ‘acting’ judges of appeal in certain circumstances, such as to make up a temporary absence of a Judge of Appeal.<sup>277</sup> However, this cannot be done in the Federal Court or the Family Court because of constitutional restrictions on the tenure of federal judges.<sup>278</sup>

<sup>276</sup> D Meador et al *Appellate courts: Structures, functions, processes and personnel* Michie Company Charlottesville 1994, 400.

<sup>277</sup> *Supreme Court Act 1970* (NSW) s 28A, s 36, s 37; *Constitution Act 1975* (Vic) s 80B, and *Supreme Court of Queensland Act 1991* (Qld) s 39.

<sup>278</sup> Section 72 of the Constitution.

4.269 A second option at the federal level is to use judicial registrars and registrars to perform some limited judicial functions so as to allow judges to concentrate on important appellate work. The Family Court, in particular, has adopted this approach in the past. That Court has a long history of the use of judicial registrars and as at 30 June 2000 had seven such positions.<sup>279</sup>

4.270 A third option, and the focus of this section, is to reconsider the size and composition of federal appellate benches, as provided for by federal legislation.

4.271 Under s 4 FLA, the Full Court of the Family Court is constituted by three or more judges sitting together. Under s 14 FCAA, the Full Court of the Federal Court consists of three or more judges, unless a judge constituting the Full Court in a particular appeal dies, resigns his or her office or otherwise is unable to continue as a member of the Court, in which case two judges may continue to hear the appeal if the parties consent. In general, the appellate jurisdiction of the Federal Court must be exercised by a Full Court (s 25(1) FCAA).

4.272 In Australia, it is customary for intermediate appellate courts to be constituted by a bench of three judges.<sup>280</sup> This accords with the view held generally that the number of judges hearing an appeal should increase the higher one progresses in the judicial hierarchy. This is based on the view that

[i]nstitutional decisions intrinsically involve the principle of check. A jury of twelve is better than a jury of one because the twelve check each other's weaknesses, emotions, and idiosyncrasies; a nine-judge court or a three-judge court is better than a one-judge court for the same reason.<sup>281</sup>

4.273 A system whereby the judgment of a single judge is reviewed by a single appellate judge is likely to be inconsistent with public perceptions of fairness and judicial accountability. This might result from a public concern with the simple substitution of one judge's opinion for another, or because the outcome on appeal might be seen to place undue emphasis on the identity of the judge and his or her judicial approach rather than on the quality and effectiveness of the appellate decision making process.

4.274 Two questions that emerge when considering this issue are whether smaller appellate benches might improve the efficiency of the appeal process, and at what cost. Appeals in Australian courts are generally heard by no less than three judges,

279 Family Court *Annual report 1999–2000*, table, 43. The Federal Court also had judicial registrars, inherited from the Industrial Relations Court of Australia, but there are currently no holders of that office.

280 Intermediate appellate courts may sit with more than three judges in special circumstances, such as to address apparent conflicts between earlier decisions of the court, or to issue warnings to the profession. See Supreme Court of NSW *Annual review: Year ended 31 December 1998* Sydney 1999, 38.

281 K Davis *Discretionary justice: A preliminary inquiry* Louisiana State University Press Baton Rouge 1969, 143.

but it has been suggested that more panels could be constituted, and delays reduced, if a court comprised of two judges heard certain appeals. Some jurisdictions currently allow for this.<sup>282</sup> In the High Court, for example, an appellate court may be constituted by two or more justices, unless the appeal is from a judgment of a Full Court of a State Supreme Court, in which case it must be constituted by a minimum of three justices.<sup>283</sup> In practice, the power to hear full appeals in panels of two is not utilised.<sup>284</sup>

4.275 Two judge panels are used in many United States jurisdictions and in South Africa.<sup>285</sup> The Bowman report on the English Court of Appeal recommended that there be a discretion to list cases before a single member of the Court of Appeal in civil cases,<sup>286</sup> and also that consideration be given to the greater use of two judge appellate courts, at least where no fundamental point of principle or practice is involved.<sup>287</sup> These recommendations were based on the view that cases should be dealt with according to their individual needs and that resources should be employed in proportion to that need.

Valuable resources should not be devoted to cases which have no real need of them. A move towards allowing judicial discretion to determine the constitution of the court according to the individual nature of the case sits well with the general principle of introducing greater case management, which runs through the whole of the civil justice reforms.<sup>288</sup>

4.276 More recently the Lord Chancellor proposed that legislative provisions prescribing the constitution of courts in appeal hearings<sup>289</sup> should be removed and replaced with a provision that the Court of Appeal may sit for the purpose of exercising its jurisdiction in constitutions of one, two or more judges.<sup>290</sup>

282 See for example *Supreme Court Act 1935* (WA) s 57 and Order 63A of the Rules of the Supreme Court (WA), which allows appeals on interlocutory matters to be heard by a Full Court of the Supreme Court constituted by two judges unless a judge or the Full Court directs otherwise; *Supreme Court Civil Procedure Act 1932* (Tas) s 14(a); *Supreme Court Act 1970* (NSW) s 46A.

283 JA s 19, s 20, s 21.

284 However, this is not so in relation to a number of procedural motions relating to appeals. The appellate issues that may commonly be heard by less than three judges relate to applications for leave, applications to dismiss appeals, procedural appellate matters, consent orders, and admitting an appellant to bail in criminal proceedings; s 25(2), s 25(2B) FCAA.

285 D Ipp 'Reforms to the adversarial process in civil litigation — Part II' (1995) 69 *Australian Law Journal* 811, 819.

286 Bowman report, 56–7.

287 Bowman report, rec 36.

288 Lord Chancellor's Department *The Court of Appeal (Civil Division): Proposals for change to Constitution and jurisdiction* London 1998, ch 2 para 2.

289 *Supreme Court Act 1981* (UK) s 54.

290 Lord Chancellor's Department *Proposal for Change to Constitution and Jurisdiction: A Lord Chancellor's Department discussion paper* (July 1998).

4.277 In its Discussion Paper, *Review of the federal civil justice system*,<sup>291</sup> the Commission observed that the use of appellate benches of two or more judges could alleviate caseload pressures in the Federal Court. Submissions to the Commission as to how this might be achieved varied. The Law Council submitted that instead of having two-judge appeal courts at the discretion of the Chief Justice, as the Commission proposed, it would be more appropriate for legislation to provide categories of cases in which two-judge appellate benches may be used, with the discretion left to the Chief Justice to constitute them.<sup>292</sup> The Commission's final report, in light of the varied response, refrained from making specific recommendations on the topic. The Federal Court is currently considering the issue in its review of its appellate procedures.

4.278 Appellate benches of less than three are unlikely to be suitable for appeals raising issues of significant public importance, matters involving conflicting precedent, or matters of factual or legal complexity. Reduced benches are likely to be more appropriate in cases that appear relatively straightforward, such as the application of settled principles of law to simple facts. On the other hand, there may be cases where a bench of more than three may be desirable. Appropriate use of larger panels might reduce the likelihood of appeals being taken to the High Court. However, inappropriate use could expend judicial resources without any compensating advantages. Under the current legislation it is open for both the Full Court of the Family Court and the Full Court of the Federal Court to be constituted by more than three judges. Courts do sometimes use more than three judges to determine appeals. For example, in *John Pfeiffer Pty Ltd v Rogerson*,<sup>293</sup> an appeal to a Full Court of the Federal Court was heard by a bench of five judges, presumably because the judgment appealed from had been rendered a Full Court of the ACT Supreme Court, comprised of three judges.

4.279 One significant problem that might arise from the use of two member appeal courts is that valuable court resources could be wasted if the members of the panel disagreed and the matter had to be reconsidered before a bench of three.<sup>294</sup> An awareness that failure to agree will result in substantial expense for the litigants may place pressure on judges to agree in the interests of case management rather than deciding the appeal on its merits, as each judge perceives them.<sup>295</sup> Alternatives to a re-hearing when a two-judge court disagrees would be to have a casting decision made on the papers by a third judge, for the appeal to be denied, or for the decision of the more senior judge to prevail.<sup>296</sup>

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291 ALRC DP 62, 294.

292 ALRC 89, 457–8.

293 (2000) 172 ALR 625.

294 This is the case in the New South Wales Court of Appeal: *Supreme Court Act 1970* (NSW) s 46A(6).

295 Lord Oliver 'The appeal process' (1992) 2 *Journal of Judicial Administration* 63, 68–9. See also *Queensland v JL Holdings* (1997) 189 CLR 146.

296 The latter two solutions are provided for by s 23(2) JA for split decisions in the High Court, depending on how the proceeding came to the Court. See also s 16 FCAA, s 30 FLA.

4.280 Other difficulties have been identified with the use of small appellate panels. Varying the number of judges in appellate courts may create litigant dissatisfaction due to a perception that there are degrees of appellate justice. In addition, the use of two-judge benches may artificially confine the diversity of judicial opinions on issues presented in a particular case.<sup>297</sup> This may increase the likelihood of inconsistencies or conflicts between panels within the intermediate appellate court.

**Question 4.29.** Should first appeals in federal courts be able to be determined by fewer than three judges, either generally or in particular cases?

**Question 4.30.** If a discretion is given to a Chief Justice to constitute an appellate court with less than three judges, how should those discretions be confined or structured?

**Question 4.31.** Is it desirable to constitute an appellate court with as few as one judge, as the Bowman report recommended for the English Court of Appeal?

**Question 4.32.** If an appellate court is constituted by two judges, what should happen if their opinions differ? Should the appeal be denied, should the opinion of the senior judge prevail, should a casting decision be made by a third judge on the papers, or should the matter be reheard before a larger bench?

**Question 4.33.** If an appellate court of fewer than three judges determines a matter, should there be any right of appeal to a court of three or more judges and, if so, in what circumstances?

**Question 4.34.** In what circumstances should an appellate court sit more than three judges, for example, in appeals raising issues of public importance, precedential conflict, or other legal or factual issues of considerable complexity? If the court sits in panels of more than three, how many judges should sit?

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297 D Bennett 'Delay reduction in the New South Wales Court of Appeal: Commentary' (1996) 6 *Journal of Judicial Administration* 109, 112.

## A national appellate court?

4.281 Appellate court processes cannot be considered in isolation from the structure within which they take place. In this context, concerns have been expressed that the existing mechanism of appellate review by state and federal courts in matters of federal jurisdiction do not assist in achieving an adequate level of precedential uniformity in the interpretation of Australian laws.

4.282 One possible means of addressing concerns about precedential conflict at the intermediate appellate court level would be to establish an intermediate appeal court, either to replace the existing intermediate appellate courts or as another appellate tier above them. Such a court could be a new federal court, which could hear appeals from the Federal Court, the Family Court, the Federal Magistrates Court and from state and territory courts exercising federal jurisdiction. Alternatively, the court might be a national appellate court with power to hear appeals from federal, state and territory courts in relation to federal, state and territory jurisdiction. The first of these options could be implemented by legislation; the second would require constitutional change. Such a new court, whether federal or national, might also assist in reducing the appellate burden of the High Court.

4.283 This section examines the history of proposals for reforming the structure of Australia's appellate courts and discusses arguments for and against the establishment of a national intermediate appeal court.

### History of proposed structural reforms

4.284 The concept of a national intermediate appellate court has been the subject of debate for some time and has generally been presented as part of a broader proposal for a unified or integrated Australian court system. Some distinguished former and current judges from both state and federal courts have expressed support for a federal appellate court.

4.285 The history of proposals for alterations in the structure of the Australian judicial system up until 1987 is set out in the report of the Australian Judicial System Advisory Committee to the Constitutional Commission.<sup>298</sup> It is instructive to review these proposals, particularly those advancing a national court of appeal, by Sir Frances Burt and Sir Laurence Street in 1982 and proposals considered by the Australian Constitutional Convention in 1983 and 1985.

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298 Advisory Committee to the Constitutional Commission *Australian judicial system* Commonwealth of Australia Canberra 1987, 30–35.



4.286 In 1982, the then Chief Justice of Western Australia, Sir Frances Burt, suggested a system of integrated courts based on existing institutions. The High Court would remain at the top of the system and beneath it would be an 'Australian Court of Appeal' and the Supreme Courts of the states and territories. The Australian Court of Appeal would be the forum for appeals from the Supreme Courts, and the High Court would entertain appeals only by special leave from this appeal court.<sup>299</sup> Each of the Supreme Courts of the states and territories would be invested with federal jurisdiction and be organised into divisions which would reflect some of the jurisdiction of the Federal Court, such as bankruptcy. Sir Francis suggested that the Federal Court be used as the basis for the Australian Court of Appeal.<sup>300</sup> This option would minimise a major systemic difficulty of jurisdictional conflict and the problem of parties litigating in the wrong forum.<sup>301</sup>

4.287 Sir Laurence Street, then Chief Justice of New South Wales, made a proposal in 1982 to attempt to deal with the significant jurisdictional problems arising from the relationship between federal and state courts.<sup>302</sup> He proposed that the High Court, at the apex of the judicial system, be brought together with all the existing superior courts as the Supreme Court of Australia. This Supreme Court of Australia would be made up of ten divisions, including an Appeal Division, which would sit separately in the various states and territories and hear appeals from any first instance decision in that division.

4.288 The scheme proposed by the Australian Constitutional Convention in 1983 recommended

that the Constitution be amended to provide for Federal courts and State courts of Supreme Court level and above to be integrated into a single system of Australian Courts with three distinct levels

- (a) a trial level
- (b) an appellate level
- (c) the High Court as the final court of appeal.<sup>303</sup>

4.289 This resolution was referred to the Convention's Judicature Standing Committee for it to recommend a model for such an integrated system. The Standing Committee did not recommend an integrated court at trial level but rather that there be cross-vesting of jurisdiction at trial level between the federal, state and territory Supreme Courts, together with the introduction into the existing

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299 F Burt 'An Australian judicature' (1982) 56 *Australian Law Journal* 509.

300 id, 512–513.

301 id, 510–11.

302 L Street 'Towards an Australian judicial system' (1982) 56 *Australian Law Journal* 515.

303 Proceedings of the Australian Constitutional Convention 1983, Vol I, 317 as cited in Advisory Committee to the Constitutional Commission *Australian judicial system* Commonwealth of Australia Canberra 1987, 32–33.

system of an Australian Court of Appeal.<sup>304</sup> The Standing Committee recommended that the Australian Court of Appeal be created as a superior court of appeal below the High Court. It would be a federal court, with a Commonwealth Minister responsible for its administration and support. The proposed court was to consist of a President and a pool of permanent judges, together with all the judges of the Federal Court and of the state Supreme Courts, who would also continue to sit in their own courts but who would be available to sit on the Australian Court of Appeal from time to time.

4.290 In 1987, these issues were agitated once again in the Advisory Committee on the Australian Judicial System. The majority of the Committee was of the view that there should remain separate federal and state courts and that there should be no structural change in the Australian court system.<sup>305</sup> However, the Advisory Committee supported the view that there should be provision for cross-vesting of jurisdiction and that the constitutional power to legislate to give effect to cross-vesting be clarified.<sup>306</sup>

4.291 The Advisory Committee, and later the Constitutional Commission, concluded that there were insufficient reasons to amend the Constitution to establish a new national court of appeal between the present intermediate appellate courts and the High Court.<sup>307</sup>

### Arguments for a national court of appeal

4.292 There are two principal reasons put forward to support a national court of appeal. One is that it would increase the level of uniformity of Australian law and the other is that it would reduce the appellate burden of the High Court, particularly in relation to disputes about precedents at federal court and state court level.

4.293 Sir Anthony Mason, when Chief Justice of Australia, commented

[b]ecause we do not have a single national courts system, the nature of the work undertaken by appellate courts differs...The establishment of one national intermediate appellate court would bring greater uniformity to our judge-made law and, in that respect, lessen the burden on the High Court which presently has the sole task of resolving conflicting decisions of State and federal courts...<sup>308</sup>

304 Judicature Sub-committee Report to Standing Committee on an Integrated System of Courts (1984) Proceedings of the Australian Constitutional Convention 1985, Vol II, 14.

305 Advisory Committee to the Constitutional Commission *Australian judicial system* Commonwealth of Australia Canberra 1987, 40.

306 id, 44.

307 id, 35–37; Constitutional Commission *Final report* AGPS Canberra 1988, 371.

308 A Mason 'The role of the courts at the turn of the century' (1994) 3 *Journal of Judicial Administration* 156, 161–2.

4.294 Sir Anthony considered that appellate judges sitting on intermediate courts of appeal are predominantly concerned with the business of ‘formulating and redefining the legal principles which constitute the interpretation of statutory provisions’. Nonetheless, such appellate judges are to some extent constrained in their ability to redefine legal principle because, in the absence of a national intermediate appellate court, the generally accepted norm is that any significant change in judicial law-making is properly the domain of the High Court. Sir Anthony argued that courts other than the High Court should be involved in significant judicial law-making, because

the volume of work now coming to the High Court by means of applications for special leave to appeal and constitutional cases is so great that the court may not be able to discharge adequately its responsibility for formulating and redefining the principles of judge-made law unless intermediate courts of appeal play a greater part in that process. The existence of High Court precedents creates an obstacle but the obstacle may loom larger in some judicial minds than it really is. The existence of High Court precedents in the law of income tax has not prevented the Federal Court playing an appropriate role in that area of law.<sup>309</sup>

4.295 In a 1987 article, McHugh J supported the intermediate appellate courts adopting an expansive ‘law making’ role.<sup>310</sup> Similarly Ipp J has stated that

[t]he appellate caseload explosion threatens the High Court’s role as the enunciator of national law as it is able to give full review to only a fraction of the cases where leave to appeal is sought. As the decisions of the intermediate appellate courts increase in number, there is a corresponding decline in the percentage of those decisions that the High Court reviews, thus making the intermediate appellate courts more and more the nation’s courts of last resort.<sup>311</sup>

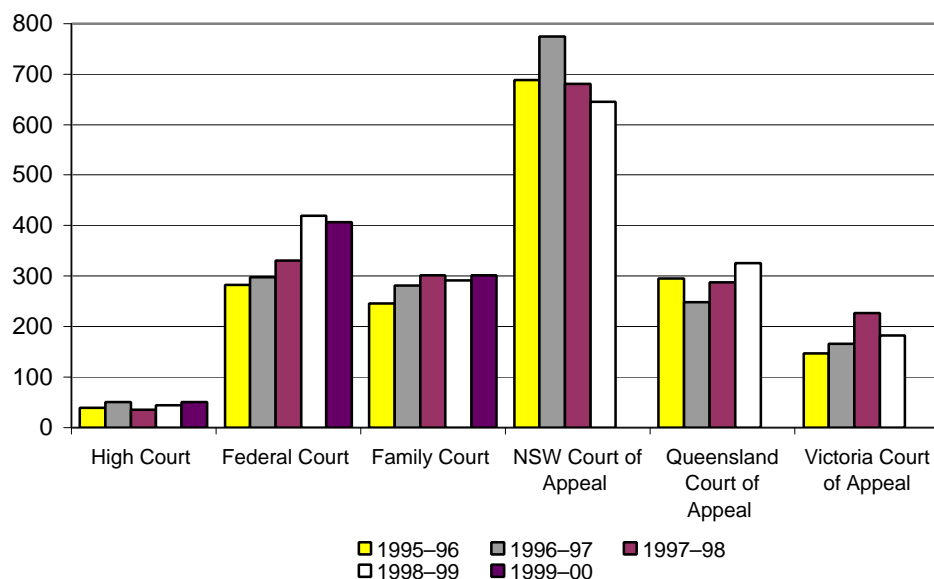
4.296 The extent to which intermediate appellate courts carry the bulk of the appellate workload in Australia can be seen from Figure 5. Currently, about 50 civil appeals are filed each year in the High Court (following a grant of special leave) compared with hundreds filed in the Federal Court, Family Court and state Supreme Courts.

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309    *ibid.*

310    M McHugh ‘Law making in an intermediate appellate court: The New South Wales Court of Appeal’ (1987) 11(2) *Sydney Law Review* 183, 188.

311    D Ipp ‘Reforms to the adversarial process in civil litigation — Part II’ (1995) 69 *Australian Law Journal* 790, 811.

**Figure 5: Civil appeals filed in selected Australian appellate courts**

Source: High Court of Australia *Annual report*, Federal Court *Annual report*, Family Court *Annual report*, Supreme Court of New South Wales *Annual review*, Supreme Court of Queensland *Annual report*, Supreme Court of Victoria *Annual report*, various years.

Notes: Figures for New South Wales and Victoria are for calendar years.

4.297 As most appeals are in practice brought to finality by a judgment of a state, territory or federal intermediate appellate court, there is a heightened capacity for discrepancies and inconsistencies of law to arise. Santow J and Leeming have argued that

[p]recedential conflict between State courts and with the Federal Court will tend to increase, as legislation like the Corporations Law applies uniformly across Australia. This paradox of legislative unity and interpretive disunity arises because its interpretation is then spread amongst all superior courts, State and federal, assisted by the Cross-vesting scheme...The High Court's burgeoning workload will increasingly limit its capacity for appellate intervention in resolving conflict and refining the law.<sup>312</sup>

4.298 The authors document many examples in corporations law, negligence and land law in which divergent judicial interpretation between state Supreme Courts and the Federal Court is apparent.<sup>313</sup> The High Court has recognised the importance

312 K Santow & M Leeming 'Refining Australia's appellate system and enhancing its significance in our region' (1995) 69 *Australian Law Journal* 348, 349.

313 id, 349, 361-364.

of uniformity of decision by intermediate appellate courts, observing in *Australian Securities Commission v Marlborough Gold Mines Limited* that

the need for uniformity of decision in the interpretation of uniform national legislation such as the Law [the Corporations Law] is a sufficiently important consideration to require that an intermediate appellate court... should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.<sup>314</sup>

4.299 There may be some debate about the extent to which precedential conflict between intermediate appellate courts causes practical problems for the overall development of Australian law. One view is that the differences, or apparent differences, in the common law applied in the states and territories may not be very great and the High Court can resolve any significant differences.<sup>315</sup> On the other hand, the High Court has made it clear, most recently in *John Pfeiffer Pty Ltd v Rogerson*,<sup>316</sup> that there is a single common law in Australia, as enunciated by the High Court from time to time.

4.300 Other possible arguments in favour of a national court of appeal are that it would

- ?? be compatible with the objective of a national profession and a national legal services market as supported by the Hilmer National Competition Policy Review<sup>317</sup> and the report of the Trade Practices Commission on competition and regulation of the legal profession,<sup>318</sup> and
- ?? enhance Australia's provision of legal and dispute resolution services in an increasingly global market.<sup>319</sup>

4.301 More recently French J of the Federal Court has suggested that a national court of appeal in federal jurisdiction remains a possibility. French J commented

[i]f the three tier state systems of Supreme, District or County and Magistrates' Courts evolves into two tiers for trial work with Courts of Appeal in each state, the case for a National Court of Appeal incorporating state Appeal Courts may also be strengthened.<sup>320</sup>

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314 (1993) 177 CLR 485, 492.

315 L Priestley 'A federal common law in Australia?' (1995) 6 *Public Law Review* 221, 235.

316 (2000) 172 ALR 625.

317 Independent Committee of Inquiry *National competition policy* AGPS Canberra 1993 (Hilmer report).

318 Trade Practices Commission *Study of the professions — legal* Final report 1994 (TPC Final report).

319 P Short 'Globalisation — An opportunity and a challenge' (1997) 32(8) *Australian Lawyer* 7.

320 R French 'Federal courts created by Parliament' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 159.

### Arguments against a national court of appeal

4.302 There are a number of arguments against the introduction of a national court of appeal. One is that there may be significant constitutional obstacles depending on the model chosen. If a new appeal court is established as a federal court its appellate jurisdiction must be confined to matters of federal jurisdiction (see Chapter 4). A national appellate court could not be achieved by conferring state jurisdiction on federal courts. There would be a consequent vacuum in the role of the court in relation to the hearing of appeals in matters of state jurisdiction. In addition, the High Court's decision in *Kable v Director of Public Prosecutions (NSW)*<sup>321</sup> suggests that the Constitution requires that state Supreme Courts be retained as courts of general trial and appellate jurisdiction. If that view is correct then a national appellate court could not replace existing state Supreme Courts.

4.303 The Advisory Committee to the Constitutional Commission gave the following reasons why a national court of appeal sandwiched between the existing courts of first appeal and the High Court should not be introduced.

- ?? A new appellate level would add considerable cost to litigation.
- ?? The overall quality of the present intermediate appeal courts would decrease, as would the prospects of obtaining appointees to the federal courts and Supreme Courts.
- ?? If there are problems with the intermediate appellate courts being in effect the final appellate court for many cases, the remedy lay in the composition or workload of those courts rather than introducing an additional appellate layer.
- ?? The importance of the High Court as the final arbiter on all questions of Australian law might be reduced through a temptation to restrict the High Court to constitutional or public law cases.
- ?? The number of judges necessary to constitute an additional court of appeal would mean that the possibility of divergent views on the one topic would remain.<sup>322</sup>

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321 (1997) 189 CLR 51.

322 Advisory Committee to the Constitutional Commission *Australian judicial system* Commonwealth of Australia Canberra 1987, 36.

4.304 Another argument against the introduction of a national court of appeal is that because such a court would be the sole venue for appeals in federal jurisdiction, the status and prestige of the state courts would decline as their jurisdiction to determine these matters was removed. As noted by the Constitutional Commission

[a]s the Commonwealth increasingly vests federal jurisdiction in federal courts there is a corresponding decline in the role of the State courts. If the areas of federal court jurisdiction continue to expand, the courts of the States will become more and more restricted in the scope of their jurisdiction. This could result in the disappearance of much of the variety of disputes which State courts could hear and ultimately in a decline in the quality of appointees to State courts and a gradual loss of prestige.<sup>323</sup>

4.305 Whatever the substantive merits of a national appeals court, it is clear that there are significant practical difficulties in developing and achieving such a court. It seems likely that without constitutional amendment the Commonwealth Parliament could not validly establish

- ?? an integrated national court system consisting of a 'hybrid' court that is neither state nor federal, or
- ?? a federal court to operate as a national intermediate appellate court in matters of state and federal jurisdiction.

4.306 As noted in Chapter 1, the Commission does not intend to enquire into matters requiring constitutional amendment. The Commission's main purpose in including this topic is to identify it as an issue for future consideration. The creation of a national appellate court clearly has had considerable long term support as a concept, with its perceived advantages of ensuring greater uniformity in Australian law and reducing the appellate burden of the High Court. Achieving those objectives could ultimately reduce the costs of litigation by reducing the number and complexity of appeals nationally, including those heard by the High Court.

4.307 However, it is worth noting that if constitutional change were necessary to achieve a national appellate court, then there would be formidable political challenges to be faced in attaining such change. Historically, constitutional amendments by referendum under s 128 of the Constitution are uncommon — only eight of the 44 proposals have succeeded.<sup>324</sup> These challenges would be particularly significant in the case of a proposed new level of appellate court because the issue concerns the complexities of state and federal court jurisdiction. In addition, and perhaps most importantly, the successful introduction of a national

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<sup>323</sup> id, 28.

<sup>324</sup> R Lumb & G Moens *The Constitution of the Commonwealth of Australia annotated* 5<sup>th</sup> ed Butterworths Sydney 1995, para 43. Most recently two referendums on an Australian Republic were held in conjunction with the federal election in 1999. Both questions were defeated.

court of appeal would require significant federal, state and territory agreement on an issue that is likely to invite wide differences of opinion. Such agreement would appear to be very difficult to achieve. For example, agreement would be necessary as to who should appoint and remove judges to the new court and how it should be funded.

**Question 4.35.** What structural changes, if any, should be made to Australia's appellate system? What changes, if any, could be made without constitutional amendment?



## 5. Claims against the Commonwealth

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### Introduction

5.1 The terms of reference ask the Commission to inquire into and report on a number of issues that relate specifically to claims against the Commonwealth. Particular matters mentioned are

- ?? the appropriateness of Part IX JA (s 56–67)
- ?? the desirability of Commonwealth legislation to regulate claims against the Commonwealth, in place of reliance on existing state and territory law
- ?? the desirability of s 64 JA in relation to rights created by statutes to which the Commonwealth is not otherwise subject, and
- ?? the state of the law regarding claims against the Commonwealth in the light of recent High Court decisions, in particular, *Commonwealth v Mewett* ('Mewett')<sup>1</sup> and *Re The Residential Tenancies Tribunal of NSW and Henderson; ex parte Defence Housing Authority* ('Henderson').<sup>2</sup>

5.2 This aspect of the reference raises complex issues regarding the Commonwealth's immunity from being sued, its substantive liability, its vulnerability to legal obligations generally, and the law applicable in claims against the Commonwealth. The immunity of the Crown is not a discrete concept, but a constellation of separate immunities which have evolved differently over a history of many centuries, and have produced a maze of differing judicial interpretation. Each of the key areas of immunity in respect of legal proceedings involving the Crown, and the Commonwealth Crown in particular, are discussed in separate sections below, as follows:

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1 (1997) 191 CLR 471.

2 (1997) 190 CLR 410.

- ?? immunity from being sued
- ?? immunity from tort and contract
- ?? immunity from statute, and
- ?? immunity from execution.

5.3 The complexity of these issues is compounded by the absence in the *Judiciary Act* of an express right to proceed against the Commonwealth. Such right has been implied by the courts from various combinations of sections 39, 56, 64, 79 and 80,<sup>3</sup> as well as s 75(iii) of the Constitution. However, notwithstanding a considerable body of case law, aspects of the interrelationships between these provisions remain uncertain. Consequently, it is not clear to what extent each provision creates procedural or substantive rights, or the extent to which such rights are entrenched in the Constitution. The effect of the Constitution and the *Judiciary Act* on claims against the states and territories<sup>4</sup> is similarly unclear.

5.4 Where a claim against the Commonwealth involves the application of legislation, the Commonwealth's immunity from statute is also in issue. It must be determined whether the statute binds the Crown and if so, in which capacity. In the case of statutory tortious or other modified common law damages claims, it must be determined whether the *Judiciary Act* of its own force binds the Commonwealth.<sup>5</sup> If a statute is technically binding, it must then be determined whether or not it unconstitutionally infringes on the executive power of the Commonwealth.

5.5 The limited set of circumstances in which the Commonwealth may benefit from immunity has potentially been narrowed by two recent High Court decisions. In *Mewett's* case,<sup>6</sup> a bare majority of the Court held that the Commonwealth's immunity from being sued was removed by the Constitution, in respect of liability that was pre-existent in the common law. This overturned previous decisions, which held that that such immunity was removed by the *Judiciary Act* alone,<sup>7</sup> but it left open the possibility of Parliament legislating with respect to the Commonwealth's underlying substantive liability.

5.6 In *Henderson*,<sup>8</sup> it was held that the Commonwealth could be bound by any state legislation that is not expressly directed at it and which does not conflict with a valid Commonwealth law. This overturned previous decisions, which broadly prohibited state legislation from regulating the activities of Commonwealth

3 Sections 79 and 80 JA are discussed in Ch 6.

4 Unless otherwise specified, all references to 'states' in this chapter are inclusive of territories.

5 See for example *Maguire v Simpson* (1977) 139 CLR 362.

6 *Commonwealth v Mewett* (1997) 191 CLR 471.

7 For example *Mutual Pools Pty Ltd v Commonwealth* (1994) 179 CLR 155.

8 *Re The Residential Tenancies Tribunal of NSW and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

instrumentalities.<sup>9</sup> The decision in *Henderson* must be read together with those in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*,<sup>10</sup> and *Bropho v Western Australia*.<sup>11</sup> The first of these decisions extended the ‘general rule of construction’ to all situations in which a statute purports to bind some manifestation of the Crown; the second altered the rule to make it less onerous to satisfy.

5.7 The circumstances in which the Commonwealth may claim immunity from statute are now potentially very few, but the full impact of these decisions is not yet clear. The Attorney-General of New South Wales has submitted to the Commission that the Commonwealth and the states differ as to their interpretations of these recent decisions and ‘clarification of the extent to which the Commonwealth is bound by both general and special laws of the states and territories would appear to be desirable’.<sup>12</sup>

5.8 In relation to damages claims, the Commonwealth’s immunity from execution of judgment must also be considered. At common law and in all legislation concerning claims against the Crown in the right of the Commonwealth, the states and territories, a successful plaintiff cannot attach crown assets to satisfy a judgment debt. As such debts are to be paid from consolidated revenue, this immunity is rarely a source of controversy in Australia. However, aspects of the law in this regard are unclear, and the potential for controversy is evidenced by the experiences of some overseas jurisdictions.

5.9 Finally, it must be clear that the proper defendant to a claim is ‘the Commonwealth’. All Commonwealth activities are performed through individuals, corporations or other entities. It must be established, therefore, that the entity from whose act or omission a cause of action arises was under the control of the Commonwealth, acting on its behalf under adequate authority, and performing a function for which the immunities of the Commonwealth may rightfully extend. This is highly complex in respect of business entities which are incorporated or contracted to carry out Commonwealth activities. This question, as with all issues of crown immunity, arises as a result of the significant differences between modern governments and those which existed when crown prerogatives were first established. Government entities now increasingly infiltrate the lives of private citizens, whether it be through their more sophisticated administrative functions, or their high level of engagement in commercial activities in competition with private players in the marketplace. The issue of whether and to what degree there must be legal equality between government and citizen in this environment looms ever larger.

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9 See *Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372.

10 (1979) 145 CLR 107.

11 (1990) 171 CLR 1, 21–22 (Mason CJ, Deane, Dawson, Toohey Gaudron, McHugh JJ).

12 Attorney-General of New South Wales *Submission J002*, 4–5.

5.10 The impact of the Constitution itself on claims against the Commonwealth and the states is a matter for the courts, and beyond the scope of legislative reform. However, the view taken on this issue is critical for determining the appropriate task for the Commission in reviewing the *Judiciary Act*. For the purposes of this reference, it is assumed, pending further judicial clarification, that the *Judiciary Act* itself may affect procedural or substantive liability in actions against the Commonwealth. Such an approach is supported by the conclusions of the 1988 report of the Constitutional Commission. In relation to problems in the interpretation of s 64, the *Judiciary Act*'s most controversial provision, the Constitutional Commission decided not to support a proposal that such problems be addressed by amendment to the Constitution. The Commission concluded that the section had been dealt with adequately by the High Court, and could be amended if necessary by Commonwealth legislation.<sup>13</sup>

## History and policies

### The origins of crown immunity

5.11 With the rise of parliamentary power in the United Kingdom, the courts created a number of areas of crown prerogative, rebuttable by statute.<sup>14</sup> The crown prerogatives may be divided into two basic classes. The first class comprises those rights that arise from the pre-eminence that the Sovereign enjoys over those beneath it — privileges, immunities, preferences; facultative powers; and proprietary rights. The second class comprises the governmental powers that derive from the Sovereign — powers required to administer the realm legally, militarily, socially and economically.<sup>15</sup>

5.12 The Crown's prerogative immunity from suit has its origins in two centuries-old doctrines. The first of these was purely procedural: the courts were established by the King, and a King could not be sued in his own court.<sup>16</sup> The second doctrine — 'the King can do no wrong'<sup>17</sup> — extinguished the King's substantive liability<sup>18</sup> for his acts or omissions. This originally was a personal right of the monarch pre-

13 Constitutional Commission *Final Report of the Constitutional Commission* AGPS Canberra 1988, para 2.59–2.61; see Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill (1990), Law and Justice Legislation Amendment Bill (No 2) (1991), Attorney-General's Second Reading Speech *Hansard* (H of R) 31 May 1989, 3298–3300.

14 Crown prerogatives cannot be abolished as a result of non-user, but must be abrogated by statute: H Renfree *The Executive Power of the Commonwealth of Australia* Legal Books Sydney 1984, 397.

15 See Commonwealth Attorney-General's Department *Submission 15*, cited in Senate Standing Committee on Legal and Constitutional Affairs *The doctrine of the shield of the Crown* Report Commonwealth of Australia Canberra 1992, para 2.4; N Dixon 'Limiting the doctrine of intergovernmental immunity' (1993) 9 *QUT Law Journal* 1.

16 W Holdsworth 'The history of remedies against the Crown' (1922) 38 *LQR* 141; S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, para 7.3.1.

17 See for example *The Laws of Australia* LBC Vol 19.3, 92. 'King' for this purpose refers to the monarch whether King or Queen, however, the adage generally uses 'King'.

18 Immunity from tort is discussed separately below.

dating even the existence of courts. When these were established, the doctrine also had the procedural consequence that the right to commence a suit could not be granted, as the cause of action did not exist.<sup>19</sup> With the ascendancy of Parliament and the administrative machinery of government, the personal immunities of the monarch were absorbed by the government entity of the state in question and extended to its servants and instrumentalities, all of which fell under the aegis of 'the Crown'.<sup>20</sup>

5.13 As the English Crown expanded the range and scope of its activities, so its interaction with the public and involvement in the marketplace grew. The Crown's dealings with citizens and private corporations became common, and the practical necessity for the crown to be legally bound in such circumstances was imperative. Unless the immunity was removed in most cases, it would unjustly prevent deserving plaintiffs, such as those injured or suffering loss or damage due to the negligence of crown entities, from having any remedy. Under English common law, the right to sue the Crown was gradually becoming more widely recognised, culminating in the clear right of action created by the Crown Proceedings Act 1947 (UK).

### **From colonisation to federation**

5.14 In the Australian colonies, the need for legal equality between Crown and citizen was more pronounced, as the colonial governments were responsible for establishing the administration and infrastructure of the new colonies. Hence, the colonial governments undertook functions that in the United Kingdom would have been undertaken by private enterprise. Consequently, crown proceedings statutes were enacted in the colonies in the mid 19<sup>th</sup> century, directed at rebutting the Crown's immunity from suit.

5.15 By the time of federation in 1901, amendments and refinements to this legislation had all but eradicated crown immunity from suit. These legislative developments are discussed in paragraphs 5.106–5.108. A clear policy to this effect was established by the end of the 19<sup>th</sup> century and confirmed by the Constitutional Convention of 1898.

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19 L Erlich 'Proceedings against the Crown' in P Vinogradoff (ed) *Oxford Studies in social and legal history* (1921) part 12 cited in S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, para 7.3.1. See also W Holdsworth 'The history of remedies against the Crown' (1922) 38 *LQR* 141.

20 See also Senate Standing Committee on Legal and Constitutional Affairs *The doctrine of the shield of the Crown* Report Commonwealth of Australia Canberra 1992, para 2.3.

5.16 The members of the convention were well aware that the Crown enjoyed the presumption of substantive immunity (for example in tort) as well as immunity from being sued.<sup>21</sup> There was some doubt whether sections 75 and 76 of the Constitution had already conferred the power to remove these immunities,<sup>22</sup> or whether s 51 had already done so, apparently on the assumption that it was only necessary to bind the states in respect of matters arising under a Commonwealth law.<sup>23</sup> However, it was ultimately accepted that there was a need for a special provision to deal with the substantive immunity of the Crown.<sup>24</sup>

5.17 Consequently, the policy of enabling the Crown's immunity to be removed was manifest in the powers conferred by the Constitution and in the exercise of those powers soon afterwards in the *Judiciary Act*.

5.18 With regard to claims against the Commonwealth, the Constitution provides

s 75: In all matters...(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party...the High Court shall have original jurisdiction.

s 78: The Parliament may make laws conferring rights to proceed against the Commonwealth or a state in respect of matters within the limits of the judicial power.

5.19 The *Judiciary Act* deals with claims against the Commonwealth in sections 56 and 64<sup>25</sup> (together with s 39 as to general federal jurisdiction and sections 79 and 80 as to choice of law).

s 56(1): A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court;

if the claim arose in a State or Territory - in the Supreme Court of that State or Territory or in any other court of competent jurisdiction of that State or Territory; or if the claim did not arise in a State or Territory - in the Supreme Court of any State or Territory or in any other court of competent jurisdiction of any State or Territory.

s 64: In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

21 See Official record of the debates of the Australasian Federal Convention, Melbourne 1898 reprinted Legal Books Sydney 1986: Glynn at 1653 (2).8-1654; Symon at 1661(1).2; Downer at 1664(2).1; O'Connor at 1667(1).9; 1669(1).2 and 1679(1).5.

22 id, Symon at 1656(2).6, 1660(1).6, 1666(1).2.

23 id, Isaacs at 1671(2).8 ff.

24 id, Glynn at 1655(2).8; Higgins at 1657(1).9; Symon 1659(2).5; O'Connor at 1660(1).6, 1668(2).8, 1679(1).5; Downer at 1664(2).7-1665; Barton at 1676 ff.

25 The *Claims Against the Commonwealth Act 1902* (Cth), the first enactment pursuant to s 78 of the Commonwealth Constitution, recreated the petition of right procedure (discussed in para 5.104-5.108). However, this requirement was removed in 1903 by the *Judiciary Act*, in sections 56 and 64.

5.20 As discussed in detail in paragraphs 5.109–5.110 and 5.116, sections 56 and 64 JA in particular have been read, either separately or together, both to remove the Commonwealth's immunity from being sued and to establish its substantive liability as that of an ordinary citizen. However, this has been found by implication, in the absence of express words to this effect. The Commonwealth Parliament can and does legislate to limit the Commonwealth's substantive liability, and there remain repositories of immunity in respect of vicarious liability and administrative wrong. Further, although s 64 has been held to pick up substantive and procedural statutory provisions that relate to a suit and apply them to the Commonwealth,<sup>26</sup> the *Judiciary Act* does not extend to removal of the Commonwealth's immunity from statute generally. Consequently, removal of such immunity is a matter of statutory construction and the constitutional validity of the legislation in question.

### **The Crown in a federal system**

5.21 The Crown has had a predominant position in the Australian federal system from the beginnings of federation.<sup>27</sup> Zines has commented that the notion of the Crown pervades the Constitution.<sup>28</sup> For example, the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative (s 61). However, this is not to say that the concept of the Crown has remained static.

5.22 The early view of the Crown's role was that it was 'indivisible', that is, the Crown was a single entity not only throughout Australia but also throughout the British Empire. The High Court in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the *Engineers' case*) held that the Crown was 'one and indivisible throughout the Empire' although 'its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality'.<sup>29</sup>

5.23 This view of the 'indivisibility of the Crown', while perhaps strictly true in theory, has become modified in practice by the nature of the federal system and the increasing significance and complexity of intergovernmental relations. Lumb and Moens have commented that in spite of such general pronouncements in the *Engineers' case*, the course of judicial interpretation demonstrates the separate structure of the Commonwealth and the states referred to as the Crown in right of the Commonwealth and the Crown in right of the states.<sup>30</sup>

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26 See for example *Maguire v Simpson* (1977) 139 CLR 362.

27 W Wynes *Legislative, executive and judicial powers in Australia* 5<sup>th</sup> ed Law Book Company Sydney 1976, 383.

28 L Zines *The High Court and the Constitution* 4<sup>th</sup> ed Butterworths Sydney 1997, 249.

29 (1920) 28 CLR 129, 152.

30 R Lumb & G Moens *The Constitution of the Commonwealth of Australia* 5<sup>th</sup> ed Butterworths Sydney 1995, para 205.

5.24 This change in focus was emphasised by Latham CJ's opinion that the indivisibility of the Crown, as a legal principle, 'tends to dissolve into verbally impressive mysticism' and is of little assistance in a practical system of law where a Commonwealth can sue a state, a state can sue a Commonwealth, and a state can sue a state.<sup>31</sup> This trend has accelerated such that the High Court in *Bropho v Western Australia* said that the concept of the Crown had developed from little more than the Sovereign, or his or her direct representatives and basic organs of government, to dealing with a country 'where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour'.<sup>32</sup>

5.25 There is still some residual debate as to the relevance of the concept of 'indivisibility of the Crown'. Mason and Jacobs JJ in *Bradken*<sup>33</sup> relied upon the doctrine and commented that the *Engineers' case* had never been overturned, although a limitation had been placed on its application to particular situations, the culmination of which was the decision in *Commonwealth v Cigamatic Pty Ltd (in Liquidation)*.<sup>34</sup> However, more recently the High Court in *Jacobsen v Rogers*<sup>35</sup> has referred to 'the controversial and somewhat artificial doctrine of the indivisibility of the Crown'.

5.26 Thus in contemporary Australia, the notion of the Crown operates within the context of a developing federal system and a complex, modern society. The Crown is represented by the Executive of the federal government and by the Executive of each of the states, and the Northern Territory and the ACT as self-governing territories.<sup>36</sup> It is also possibly represented in the governments of certain external territories such as Norfolk Island.<sup>37</sup> This Crown is in practice 'divisible' in the sense that the Commonwealth, state and territory governments have different roles, policies, powers and financial resources and can either expressly or unintentionally interact and sometimes engage in dispute in political, social or economic areas. The judicial developments in relation to claims involving the Commonwealth outlined

31 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 350.

32 (1990) 171 CLR 1, 18–19; also see *Commonwealth v Western Australia* (1999) 196 CLR 392, 429 (Gummow J).

33 (1979) 145 CLR 107, 135–136.

34 (1962) 108 CLR 372. The majority (Dixon CJ, Kitto, Menzies, Windeyer and Owen JJ) determined that State legislation could not remove or qualify the Commonwealth's priority of payment in any administration of assets debts.

35 *Jacobsen and Another v Rogers FC* (1995) 182 CLR 572, 585.

36 G Taylor 'Commonwealth v Western Australia and the operation in federal systems of the presumption that statutes do not apply to the Crown' (2000) 24 *Melbourne University Law Review* 77, fn 6. In relation to the Northern Territory, see *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212, 215. Similar reasoning is applicable to the ACT — note the similarity between the *Northern Territory (Self-Government) Act 1978* (Cth) s 5 and the *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 7. Also see ch 7 for a discussion of the judicial powers of the territories.

37 G Taylor 'Commonwealth v Western Australia and the operation in federal systems of the presumption that statutes do not apply to the Crown' (2000) 24 *Melbourne University Law Review* 77, fn 6; *Fairthorn v Territory of Papua* (1938) 60 CLR 772; *Crimes Act 1914* (Cth) s 85ZQ; Office of Parliamentary Counsel (Cth) *Drafting Instruction No 1 of 1989: ACT Self-Government* (1989).



in this chapter demonstrate the separate paths and interests that Australian polities may have in relation to particular matters of policy and the need for clear and effective rules to resolve cases where disputes arise in intergovernmental relations.

### **Policies regarding crown immunity**

5.27 Answering the question whether the Crown should be immune from the operation of a law is often complicated by unclear statutory provisions regulating proceedings against the Crown, and by the long history of differing High Court opinion regarding the effect and extent of such provisions. In part, therefore, determining Crown liability or immunity is a highly technical question. However, before considering the question from a technical, legal standpoint, one must first acknowledge the widely debated policy issues which pertain to the question, and which lead to the fundamental position that either the immunity of the Crown is to be presumed, or its liability is to be presumed. That the former is presently the case in Australia, as in most common law countries, is a legal reality, but a controversial policy position on the part of the governments in question.

5.28 Clearly, whether the basic principle is one of immunity or liability, exceptions must apply. However, it remains to be determined which principle, as a general rule of law, affords the simplest, surest and most consistent means of deciding individual cases. Determining this requires analysis of when, and to what extent, each principle is applied under the present law, and the adequacy or otherwise of its results.

5.29 Some of the policy issues impacting on crown immunity, particularly those regarding equality before the law, may be applied to all the types of crown immunity discussed in this chapter. Some, however, such as those regarding federalism, have particular significance in respect of immunity from statute, and are less relevant for other types of immunity. In addition, even the widely applicable policy concerns relate somewhat differently to each type of immunity.

5.30 Consequently, the policy issues regarding crown immunity cannot be readily encapsulated in a single section of this chapter. The issues are thus set out only briefly in this section, but are also raised separately under each following section, as appropriate.

### ***Arguments in favour of retaining traditional crown immunities***

5.31 ***The uniqueness of government.*** The principal reason given for retaining the immunities of the Crown, is that the Crown, in its manifestation as the Executive government, is inherently different from ordinary citizens or corporations, and performs unique functions. Governments have functions and obligations that do not attach to private citizens, and the effective discharge of these functions may require

special powers and privileges.<sup>38</sup> Furthermore, principles of private law, founded on concepts of corrective justice, may be ill-suited to govern the relations of government and citizen, where notions of public good, community, and distributive justice come into play.<sup>39</sup>

**5.32 *Status quo.*** It is also argued that removing the presumption of immunity will not have the desired effect of clarifying the law with respect to claims against the Crown. That is, reversing the presumption will simply cause the present set of exceptions to the existing presumption to be replaced by another set of exceptions to the new presumption. It may be argued that there is not a significant difference in the number of instances in which either presumption would not prevail. Given this, preserving the existing presumption is the logical decision — one must have some starting point when deciding the liability of the Crown and there is no significant reason for departing from the long-standing starting point of immunity. As Hogg puts it in respect of the Crown's immunity from statute

It is open to parliament, when enacting a statute, either to bind the Crown or to exempt the Crown. Since Parliament has this power, it is a mere matter of drafting technique how it accomplishes the desired result. Under the present presumption, the drafter must deliberately bind the Crown when that is the desired result; if there were no presumption, then the drafter would need deliberately to exempt the Crown when that was the desired result. Provided the drafter knows the law, it is of little practical consequence whether or not there is a presumption against the Crown being bound, therefore the courts should confine themselves to ensuring that the law is as clear as possible.<sup>40</sup>

**5.33** Support for this view can be found in the decision in *Bropho*.<sup>41</sup> In this case, discussed in detail in paragraphs 5.180–5.187 and 5.210–5.211, the High Court developed a new test for whether the presumption of immunity of the Crown from the operation of a statute is rebutted. The new test is significantly easier to satisfy than the old test, meaning that the Crown was now less likely to be found immune — an effect achieved without a reversed immunity.

**5.34 *Efficacy.*** Another argument against reversing the presumption of immunity is that the law, particularly that set down in legislation, is cast in the light of the presumption of crown immunity. Reversing the presumption may require a massive redrafting process, which would be costly and time consuming, without justifiable improvement in the law. A number of overseas law reform agencies have recommended that the presumption of crown immunity be reversed. These

38 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 3, 245–246; S Price 'Crown immunity on trial: desirability and practicality of enforcing statute law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 219, 228.

39 D Cohen 'Thinking about the state: law reform and the Crown in Canada' (1987) 24 *Osgoode Hall LJ* 379, 391.

40 P Hogg *Liability of the Crown* 2<sup>nd</sup> ed LBC Ltd North Ryde 1989, 243.

41 (1990) 171 CLR 1, 21–22 (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ).

recommendations, discussed in paragraphs 5.188–5.196, have required an implementation plan for amending existing statutes. This task has clearly represented the greatest hurdle for the agencies, and its difficulty is perhaps reflected by the fact that in only one instance have the recommendations been followed by government.

5.35 **Federalism.** A major policy concern militating against the reversal of crown immunity from the laws of other polities, is that, in a federal system it is essential that one polity not be subject to regulation by the legislature of another polity. Independence of governments is fundamental to democracy in such a system. As discussed in paragraphs 5.275–5.278, the maintenance of the presumption of immunity in Australia is arguably a reflection of this concern, and even the new, lenient test from *Bropho*, though not reversing the presumption, is inappropriate for the balance of the federal system of the Commonwealth.

5.36 The primacy of independence between polities in a federation has been emphasised by the Supreme Courts both of the United States and Canada. In *Will v Michigan Department of State Police*<sup>42</sup> it was held that a federal law prohibiting a ‘person’ from violating another’s Constitutional rights was not binding on the states. The Court cited a number of previous authorities regarding the federal balance and preservation of state powers,<sup>43</sup> in concluding that the provision did not satisfy

the ordinary rule of statutory construction that if Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute’...Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States...‘In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision’.<sup>44</sup>

5.37 The Supreme Court of Canada has also enforced the policy of statutory immunity amongst polities on this basis. In *Alberta Government Telephones v CRTC*<sup>45</sup> Dickson CJC considered a number of previous authorities<sup>46</sup> and concluded that immunity of a province from a federal law had the support of a consistent and considerable body of case law and that ‘I am not persuaded that it would be appropriate to depart from that line of authority in this case. Indeed, there is much

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42 491 US 58 (1989).

43 *Atascadero State Hospital v Scanlon* 473 US 234, 242 (1985); see *Pennhurst State School and Hospital v Halderman* 465 US 89, 99 (1984); *Rice v Santa Fe Elevator Corp* 331 US 218, 230 (1947); *South Dakota v Dole* 483 US 203, 207 (1987); *United States v Bass* 404 US 336, 349 (1971).

44 *Will v Michigan Department of State Police* 491 US 58 (1989).

45 (1989) 61 DLR (4<sup>th</sup>) 227.

46 *Her Majesty in right of the Province of Alberta v Canadian Transport Commission* [1978] 1 SCR 61, *In re Silver Bros Ltd* [1932] AC 514, *Sparling v Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 SCR 1015.

to be said in favour of this interpretation'.<sup>47</sup> His Honour cited with approval 'comment' made in the *Canadian Bar Review* in respect of this line of precedent, that

[I]n a federal system it makes some sense to put the onus on a legislature to specifically include the other level of government within its enactments if they are to extend in a restrictive way. This preserves a degree of freedom to the various political units within the federation that is consistent with their mutual independence ...<sup>48</sup>

### *Arguments for reversing or abolishing traditional crown immunities*

5.38 ***Equality before the law.*** Underlying all questions of Commonwealth immunity is the fundamental legal relationship between Crown and citizen, and the degree of equality with which legal rights and obligations apply. AV Dicey developed the principle that the 'rule of law' subjected all classes in a society to one system of laws and to equal treatment by the courts, and 'in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary tribunals'.<sup>49</sup> Unlike many continental legal systems, in which a separate body of law governs the relationship between government and citizen, this principle extended to individuals acting as officers and agents of government in respect of conduct done in an official capacity.<sup>50</sup> With some exceptions and reservations, therefore, the same law should apply to the government as applies to other persons, unless Parliament provides otherwise.<sup>51</sup> This is at odds with the presumption of crown immunity, which is premised on the converse assumption.

5.39 Dicey's 'rule of law' principle is favoured as a theory of governmental liability because it denies to government special privileges and immunities that might lead to tyranny, and it places the application of the law to the executive government in the hands of a judiciary that is independent of the executive government.<sup>52</sup>

47 *Alberta Government Telephones v CRTC* (1989) 61 DLR (4<sup>th</sup>), 227 (Dickson CJ).

48 *ibid.*, citing C McNairn 'Comment' (1978) 56 *Can Bar Rev* 145, 150.

49 A V Dicey *Introduction to the Study of the Law of the Constitution* 1st ed 1885 [202 of 10th ed].

50 See generally R David & J Brierley *Major Legal Systems in the World Today* 3rd ed Stevens & Sons London 1985, 81–84.

51 New South Wales Law Reform Commission *Proceedings by and against the Crown* Report 24 NSWLRC Sydney 1976, 74; New Zealand Law Commission Report 17 *A new Interpretation Act to avoid 'prolixity and tautology'* NZLC Wellington 1990, 65–67; Law Reform Committee of South Australia *Proceedings by and against the Crown* LRCSA Adelaide 1987, 1–2, 22; P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 1–3; J R Peden 'The application of legislation to the commercial dealings of the Crown' (1977) 51(11) *Australian Law Journal* 757; S Price 'Crown immunity on trial: desirability and practicality of enforcing statute law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 227; J Wolffe 'Crown immunity from legislative obligations' [1990] *Public Law* 14, 22–23.

52 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 2–3.

5.40 The expansion in the role and function of government has placed beyond doubt the position of the state as a political, social, economic and legal entity, whose activities reach into the lives of all individuals. Applying Dicey's principle of equality to modern governments thus demands careful consideration.<sup>53</sup>

5.41 The Crown's immunity from being sued at common law has been largely extinguished by legislation. The relevant legislative provisions expressly or impliedly equate government and citizen in legal disputes, and in this sense have reversed the presumption of immunity. However, the Crown's immunity from statute law has proven more robust and has been cast far more widely than the inherent differences of government dictate. The presumption of immunity applies to all statutes, not merely those that require recognition of the special position and functions of government.

5.42 **Simplicity.** As discussed in detail paragraphs 5.201–5.211 and 5.275–5.285, there are a number of arguments which favour reversal of immunity from statute, in particular. First, it is argued that it is simpler and more certain to presume the Crown to be liable and bound by statute with some exceptions than the reverse.<sup>54</sup> If the presumption of immunity were reversed, the special functions of government would not necessarily be impeded. In a system of responsible government, the Executive is usually in a position to secure such special powers and immunities as are needed, through appropriate legislation.<sup>55</sup>

5.43 **Encouraging parliamentary consideration of immunity.** It is argued that the legislature would give more attention to issues of crown immunity if silence on the issue in the statute had the effect of exposing the Crown rather than protecting it. Reversal of the presumption avoids the injustice that may result from the non-application of a statute to the Crown by virtue of parliamentary inadvertence. There is also an incentive for Parliament specifically to address the question of immunity if it intends the Crown to be immune from the operation of the statute.<sup>56</sup>

53 A persuasive critique is given by D Cohen 'Thinking about the state: Law reform and the crown in Canada' (1987) 24 *Osgoode Hall LJ* 379, 388–392.

54 New South Wales Law Reform Commission *Proceedings by and against the Crown* Report 24 NSWLRC Sydney 1976, 64–65; See Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 107; P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 243–244; G Williams *Crown Proceedings* Stevens London 1948, 53–54; S Price 'Crown immunity on trial: desirability and practicality of enforcing statute law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 225, 227, 241.

55 See P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989.

56 New South Wales Law Reform Commission *Proceedings by and against the Crown* Report 24 NSWLRC Sydney 1976, 73–74; See Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 108; P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 244–245; G Williams *Crown Proceedings* Stevens London 1948, 54; C McNairn *Governmental and intergovernmental immunity in Australia and Canada* ANU Press Canberra 1978, 22; S Price 'Crown immunity on trial: desirability and practicality of enforcing statute law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 227; J Wolffe 'Crown immunity from legislative obligations' (1990) *Public Law* 14, 23.

5.44 **Expansion of governmental activity.** It is argued that the expansion of the activities of governments over the years has drawn them more and more within the ambit of legislation that regulates the marketplace and society generally. Since the establishment of the colonies, governments have broadened their functions from administration and infrastructure to a vast range of commercial and other activities in conjunction or competition with private citizens and corporations.<sup>57</sup> It is seen as discriminatory for statutes to apply unequally to government and private entities in such circumstances, and the concept of a 'level playing field', or 'competitive neutrality',<sup>58</sup> is widely supported.<sup>59</sup>

### Australian approaches to crown immunity

5.45 In Australia, the federal system has seen Commonwealth and state laws regarding claims against the Crown evolve separately. Notable similarities and differences have resulted, which suggest some of the possibilities, but also the difficulties, in reforming the law in this area. A further consideration is that a number of law reform agencies in Australia and overseas have addressed the issue of crown immunity. The recommendations of these bodies evidence a strong tide of legal reform directed to legislative changes that depart from the presumption of crown immunity.<sup>60</sup> Most of the recommended reforms have been to reverse the common law presumption, placing the onus on the Crown to establish exceptions in given areas of uniquely Crown activity. Others have proposed that the common law presumption be abolished and replaced with a statutory requirement that every Act state specifically whether or not it binds the Crown in right of the legislating community.<sup>61</sup> Much of the law reform focus has been on the issue of immunity from statute, and a discussion of the comparative merits of abolition and reversal is made in this context in paragraphs 5.188–5.196. However, the underlying policies stem from the general concept of crown immunity from suit.

57 New Zealand Public and Administrative Law Reform Committee *Damages in Administrative Law* Report 14 NZPALRC Wellington 1980, 67; See Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 108; P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 245; D Kinley 'Crown immunity: a lesson from Australia?' (1990) 53 *Modern Law Review* 819, 822–823; C McNairn *Governmental and intergovernmental immunity in Australia and Canada* ANU Press Canberra 1978; J Peden 'The application of legislation to the commercial dealings of the Crown' (1977) 51(11) *Australian Law Journal* 757, 758–759, 763; S Price 'Crown immunity on trial: desirability and practicality of enforcing statute law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 219–220.

58 See Independent Committee of Enquiry *National competition policies* AGPS Canberra 1993, ch 13 (the Hilmer report).

59 See for example N Seddon 'Crown immunity and the unlevel playing field' (1998) 5(4) *Agenda* 467, 474.

60 See also Attorney General of New South Wales *Submission J002*, 4–5. Against this tide, the Western Australian Parliament, in 1989, considered a Bill to amend the *Interpretation Act* 1984 (WA). The Bill purported to negate the effect of the High Court's decision in *Bropho v Western Australia* (1990) 171 CLR 1 and to restore the stricter presumption of immunity laid down in *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58.

61 See the separate opinion of Mr Gray in Law Reform Committee of South Australia *Proceedings by and against the Crown* Report 104 LRCSA Adelaide 1987, 22–23.

5.46 In respect of claims against the Commonwealth generally and the rights of the parties in resulting litigation, the crown proceedings Acts of the states and territories vary. Some of these acts reflect the language of the *Judiciary Act*, which does not clearly confer a substantive right of action.<sup>62</sup> Others appear to have followed the majority of judicial interpretations of the *Judiciary Act* which broaden its substantive effect. These Acts clearly attribute both a substantive and procedural right to sue the Commonwealth for damages. The *Crown Proceedings Act 1988* (NSW), for example, states in s 5

Section 5(1) Any person, having or deeming himself, herself or itself to have any just claim or demand whatever against the Crown (not being a claim or demand against a statutory corporation representing the Crown) may bring civil proceedings against the Crown under the title "State of New South Wales" in any competent court.

(2) Civil proceedings against the Crown shall be commenced in the same way, and the proceedings and rights of the parties in the case shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side, and shall bear interest, as in an ordinary case between subject and subject.

5.47 The Crown Proceedings Acts in South Australia, Tasmania, Northern Territory and the ACT<sup>63</sup> were amended in largely identical terms after *Commonwealth v Evans Deakin Industries* to reflect the expanded view of s 64 JA and the corresponding policy position.<sup>64</sup> Each Crown Proceedings Act provides that

proceedings may be brought by or against the Crown in the same way as proceedings between subjects; and  
the same procedural and substantive law applies to such proceedings as in the case of proceedings between subjects.<sup>65</sup>

5.48 In respect of claims against the states pursuant to statute, however, the presumption of crown immunity prevails in most states, as it does for the Commonwealth. Whether a statute binds the Crown in the right of state or territory depends upon whether, as a matter of construction, the statute expressly or impliedly rebuts this presumption.<sup>66</sup> A notable exception occurs in the ACT, in respect of the immunity of the Commonwealth government. *Australian Capital Territory (Self-Government) Act 1988* (Cth) in s 27 significantly strengthens the presumption of Commonwealth immunity from ACT statutes in stating that 'except as provided by the regulations, an enactment does not bind the Crown in right of the Commonwealth'.

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<sup>62</sup> For example, *Crown Proceedings Act 1980* (QLD) sections 8–10.

<sup>63</sup> The *Crown Suits Act 1947* (WA) s 5(1) and the *Crown Proceedings Act 1958* (Vic) contain similar language regarding the rights of the parties, although in Victoria, the Crown is liable vicariously only: *Crown Proceedings Act 1958* (Vic) s 23(1)(b).

<sup>64</sup> (1986) 161 CLR 254. See S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 284–285.

<sup>65</sup> *Crown Proceedings Act 1992* (ACT) s 5. Similarly worded provisions are contained in the *Crown Proceedings Act 1992* (SA) s 5; *Crown Proceedings Act 1993* (Tas) s 5; *Crown Proceedings Act 1993* (NT) s 5.

<sup>66</sup> See para 5.171–5.303 for a detailed discussion of Crown immunity from statute.

5.49 As is the case overseas, law reform agencies in Australia have consistently recommended legislative changes to abolish, reverse or restrict crown immunity from statute. In 1976 the Law Reform Commission of New South Wales recommended that the old rule of immunity from statute be abolished and replaced with a provision by which the Crown would be bound by statute, in most circumstances.<sup>67</sup>

5.50 More recently, the Law Reform Committee of South Australia has recommended that the presumption of crown immunity from statute be reversed, so that the Crown is presumed to be bound by statute, unless the statute expressly provides to the contrary.<sup>68</sup> As discussed in detail in paragraph 5.189, some years later, following the decision in *Bropho v Western Australia*,<sup>69</sup> the South Australian Parliament included a provision to this effect in the *Acts Interpretation Act 1915* (SA).<sup>70</sup>

5.51 A number of legal arguments were raised in support of these recommendations. These included arguments that such a wide immunity is not needed by an executive which controls the legislature; that it conflicts with the basic constitutional assumption that the Crown should be under the law;<sup>71</sup> that inconsistencies and anomalies are produced in the legislation and complex litigation results;<sup>72</sup> and that it results in immunity by default even where it is not necessarily in the public interest.<sup>73</sup> Despite these arguments, no such recommendation has yet been implemented in either state. Although the *Crown Proceedings Act 1988* (NSW) introduced a broad general right to sue the Crown, this does not expressly remove the immunity from statute.<sup>74</sup>

5.52 More so than some overseas agencies, however, there has been notable caution shown by Australian agencies when recommending the removal of the presumption of crown immunity. As discussed in paragraph 5.192, the New South Wales Law Reform Commission's abolition proposal had complicated interpretation rules which left open many avenues for reinstating immunity.<sup>75</sup> The Law Reform Committee of South Australia was similarly cautious in promoting the recognition of the vicarious liability of the Crown. The Committee was careful to

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67 New South Wales Law Reform Commission *Proceedings by and against the Crown* Report 24 NSWLRC Sydney 1976, 76.

68 Law Reform Committee of South Australia *Proceedings by and against the Crown* Report 104 LRCSA Adelaide 1987, 22–23.

69 (1990) 171 CLR 1, 21–22.

70 s 20.

71 See New South Wales Law Reform Commission *Proceedings by and against the Crown* Report 24 NSWLRC Sydney, 70–71.

72 id, 72–73.

73 id, 74.

74 *Crown Proceedings Act 1988* (NSW) s 5.

75 See Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 109–111.



state that its recommendations were not to affect the principles related to tort liability that have been and are still being developed at common law, and that there would still be some areas of Crown activity which would remain immune from suit. More specifically, the South Australian report only dealt with liability in tort at the ‘operational level’ of Crown decision-making and activity, acknowledging the distinction to be made between this level and the ‘planning level’ where Crown activities usually involve the exercise of discretion.<sup>76</sup>

5.53 Ironically, the federal parliamentary response to the prevailing common law and statutory regime regulating claims against the Commonwealth has been in direct opposition to the recommendations of overseas and state law reform agencies. Between 1989 and 1991, the federal government presented three Bills to Parliament attempting to limit the operation of s 64 JA, so as to prevent it from binding the Commonwealth to state laws of its own force. These Bills are discussed in detail in paragraphs 5.262–5.274.

### **Overseas approaches to crown immunity**

5.54 The recommendations by overseas law reform agencies regarding crown immunity have focused on its reversal. Most recommendations are directed towards immunity from statute, and are discussed in this context in detail in paragraphs 5.188–5.196. This reform agenda was created in 1972 by the Law Reform Commission of British Columbia. The Commission recommended that the presumption of crown immunity from statute be reversed.<sup>77</sup> The provincial legislature adopted the recommendation,<sup>78</sup> and the Province of Prince Edward Island followed suit in 1981, in identical terms.<sup>79</sup> The Ontario Law Reform Commission and the Alberta Law Institute made similar recommendations that have not been implemented,<sup>80</sup> and the Law Reform Commission investigated the matter as part of a larger review of the federal administration.<sup>81</sup> In New Zealand as well, the Law Commission recommended a reversal of the presumption of immunity in 1990,<sup>82</sup> and again in 1997.<sup>83</sup>

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76 Law Reform Committee of South Australia *Proceedings by and against the Crown* Report 104 LRCSA Adelaide 1987, 22–23.

77 Law Reform Commission of British Columbia *Report on civil rights Part 1 Legal position of the Crown* Project 3 LRCBC Vancouver 1972, 67.

78 *Interpretation Act* SBC 1974 s 13; now RSBC 1979 s 14.

79 *Interpretation Act* SPEI 1981 s 14.

80 Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989; Alberta Law Reform Institute *The presumption of Crown immunity* Report 71 ALRI Edmonton 1994; Bora Laskin *Law Librarian Correspondence* 29 April 2000.

81 Law Reform Commission of Canada Working Paper 40 *The legal status of the federal administration* LRC Ottawa 1985, 14.

82 New Zealand Law Commission Report 17 *A new Interpretation Act to avoid ‘prolixity and tautology’* NZLC Wellington 1990, 52.

83 Law Commission Report 37 *Crown Liability and Judicial Immunity — A Response to Baigent’s Case and Harvey v Derrick* NZLC Wellington 1997, 2–3.

5.55 As with the Australian state law reform bodies, the arguments on which these recommendations are founded encompass technical legal needs, but also statements of policy or underlying moral stance. On a policy level, it was argued that presumption of immunity is fundamentally incongruent with the principles of equality and the rule of law.<sup>84</sup> To the extent that a Parliament, dominated by the Executive, may be free to choose which laws will or will not be binding on the Crown, the rule places the Crown above the law in a manner unacceptable in democratic societies.<sup>85</sup> At a more pragmatic level, it was argued that the presumption may lead to the conclusion that the Crown is under no compulsion to observe legislation designed for the protection of the individual.<sup>86</sup> Further, there is no justification for maintaining a residue of procedural and substantive privileges which have historically lingered on without justification,<sup>87</sup> which are based on ancient and misunderstood precedents, and which do not respond to the dramatic changes which have taken place in the activities of government.<sup>88</sup>

5.56 All recommendations, whether to reverse or abolish the presumption of crown immunity, permit exceptions to such a revised basic premise. The Ontario Law Reform Commission's (OLRC) report recommended that a new Crown Liability Act be enacted to implement the reform proposals contained in the report.<sup>89</sup> The OLRC's recommendations are based on the principle that the Crown should be subject to the same law as any other person, and that any exception to this general rule must be clearly justified and can be clearly specified in legislation.<sup>90</sup> Apart from the preservation of immunity from execution, the OLRC does not specify what exceptions there ought to be, other than those which are required 'in order to govern effectively'.<sup>91</sup> The OLRC's general and central recommendation is that the presumption of crown immunity and privilege in respect of civil liabilities and civil proceedings should be reversed, and the Crown and its servants and agents should be subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity. This would apply in respect to all causes of action, including tort, contract, restitution and breach of trust, and claims governed by statute.<sup>92</sup>

5.57 The Law Reform Commission of British Columbia (LRCBC) recommended that a reversal of the presumption of immunity be included in the interpretation act. The presumption that the Crown is bound by every statute would then be the

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84 See Law Reform Commission of Canada *The legal status of the federal administration* Working Paper 40 LRC Ottawa 1985, 16.

85 id, 66.

86 See Law Reform Commission of British Columbia *Report on civil rights Part 1: Legal position of the Crown* Project 3 LRCBC Vancouver 1972, 65.

87 See Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 5.

88 Alberta Law Reform Institute *The presumption of Crown immunity* Report 71 ALRI Edmonton 1994, 1.

89 Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 7.

90 id, 112.

91 id, 109.

92 id, 6.

appropriate conceptual starting point, with the possibility of this premise being subsequently abrogated by either express words to the contrary or other considerations that indicate that this could not have been the desired result.<sup>93</sup> The Alberta Law Reform Institute (ALRI) also recommended the reversal of the presumption of immunity. It considered that this would not involve the abolition of crown immunity altogether, but would ensure that it did not apply indiscriminately. It would then be left to the legislature to declare immunity for the Crown from particular statutes which the Crown had considered was justified.<sup>94</sup>

5.58 The ALRI and the LRCBC both suggested exceptions to the reversed presumption. These included legislation and by-laws regarding planning, development, liens enforceable by forced sale of property, execution creditor legislation, insurance legislation which would prevent the government running its own 'risk management scheme', the preservation of priority of Crown liens, legislation governing mortgage remedies, and the compellability of documents created during regulatory investigations, for use as evidence in private proceedings.<sup>95</sup> As discussed in detail below in paragraph 5.191, the LRCBC's recommendation to reverse the presumption of crown immunity from statute was followed by the Parliament of British Columbia by amendment to the *Crown Proceedings Act 1979*.<sup>96</sup> British Columbia and South Australia are the primary examples to date of jurisdictions that have reversed the immunity.

5.59 In its working paper *The legal status of the federal administration*, the Law Reform Commission of Canada (LRCC) did not favour the abolition or reversal of the presumption of crown immunity from statutes. Although the LRCC clearly opposed the continued prevalence and force of the immunity, it supported legislative reform which eroded the immunity but which also took into account the Administration's peculiar status and functions.<sup>97</sup> In this regard, the LRCC considered that when criticising a general rule such as crown immunity, 'exceptional rules to accommodate objective differences' from the general rule is a preferred approach to taking 'the general body of its privileges and immunities together'.<sup>98</sup> The extraordinary functions of government in such areas as policing and supervisory responsibilities, the requirement of an ability to make unilateral administrative actions, and the conferral of benefits in the management of the public domain generally,<sup>99</sup> were seen as 'unique functions which have no

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93 See Law Reform Commission of British Columbia *Report on civil rights Part 1: Legal position of the Crown* Project 3 LRCBC Vancouver 1972, 67.

94 Alberta Law Reform Institute *The presumption of Crown immunity* Report 71 ALRI Edmonton 1994, 1.

95 *id.*, 109–112.

96 British Columbia Law Institute *Correspondence* 11 May 2000. This is effected by s 2(c) of the Act, which states that the 'government is subject to all the liabilities to which it would be liable if it were a person'.

97 Law Reform Commission of Canada *The legal status of the federal administration* Working Paper 40 LRC Ottawa 1985, 51.

98 *ibid.*

99 *id.*, 60–67.

equivalent in private law relationships'.<sup>100</sup> A better balance was required between the administration and the public, but this was 'likely to be achieved through special public law rules'. Thus, the LRCC recommended measures such as a universal compensation scheme, along the lines of workers compensation scheme, for any damage caused as a result of administrative action or any exercise of the royal prerogative'.<sup>101</sup>

5.60 In its 1997 report, the New Zealand Law Commission (NZLC) referred to the principle of equality in the Bill of Rights Act 1990 (NZ), and concluded that the principle was not adequately reflected in those laws of New Zealand which dealt with the liability of the Crown and which regulated the judiciary. In other words, the NZLC considered the presumption of crown immunity to have already been reversed by the Bill of Rights, but that this reversal had not been subsequently manifested in other statutes.<sup>102</sup> A systematic review was recommended of existing legislation conferring on the Crown and public bodies powers not enjoyed by citizens. This review should extend to immunities from suit, or liability to which citizens would be subject, including existing crown prerogative powers and immunities. Such a review should ensure that such powers and immunities are effective to attain their purpose and that they are of the minimum extent possible to do so.<sup>103</sup> The report admitted that the Crown must have powers and immunities which exist as exceptions to the general principle, stating that 'in a modern State, the range of public functions and powers is necessarily extensive'.<sup>104</sup>

5.61 Clearly, reforms favour a presumption of equality over one of immunity in respect of the Crown. Even the most comprehensive suggested reforms, however, cover only a small part of the difficulties and ambiguities that attend the application of statutes to the Crown. The reason for this is that each of the studies undertaken by a state or provincial law reform agency has focused on the application of statutes of that legislature to the Crown in right of that same community, and left intact the common law presumption of immunity, so far as the application of that statute to the Crown in some other right is concerned. In the cases of New Zealand and the United Kingdom, the lack of a federal system and therefore of different capacities of the Crown, removes any issue of inter-polity immunity. Consideration must be given to the extent to which arguments cited in favour of the reforms to date are applicable to these broader questions. These issues are canvassed in detail in paragraphs 5.171–5.285 below, which discusses crown immunity from statute.

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100 id, 83.

101 id, 74.

102 Law Commission Report 37 *Crown Liability and Judicial Immunity — A Response to Baigent's Case and Harvey v Derrick* NZLC Wellington 1997, 6.

103 id, 2–3.

104 id, 7.

The following questions arise in respect of the presumption of crown immunity generally, and are directed to the underlying policy stance which ought to be taken in respect crown immunity. Specific questions which arise from the various particular forms of crown immunity are canvassed under the relevant sections below.

**Question 5.1.** Should the Crown in the right of the Commonwealth be presumed, with some exceptions, to be different from other entities and thus less exposed to the operation of the law, or the same as any other person or entity, and equally exposed to the operation of the law?

**Question 5.2.** Should the procedural and/or substantive immunity of the Crown from being sued, including immunity from statute, be removed?

**Question 5.3.** If the immunity of the Crown is to be removed, should it be reversed or abolished?

**Question 5.4.** If the immunity of the Crown is to be removed, should this be effected in the *Judiciary Act*, in the *Acts Interpretation Act 1901* (Cth), in a separate Act, or by appropriate amendments to all federal Acts?

**Question 5.5.** If the immunity of the Crown is to be removed, what exceptions should be specified? How should such exceptions be incorporated into the law?

**Question 5.6.** To the extent that the Constitution permits, should the same principles of immunity be applied to the states as are applied to the Commonwealth?

## Constitutional background

### Introduction

There is no doubt that the Commonwealth is liable for damages in tort or for breach of contract. What is not so clear is the basis on which that liability rests.<sup>105</sup>

5.62 Much of the uncertainty regarding claims against the Commonwealth stems from the complex interrelationship between the developing common law, the *Judiciary Act* and the Constitution. While a number of provisions deal with some

<sup>105</sup> N Seddon 'The Commonwealth v Mewett (1997) 191 CLR 471: Common law actions, Commonwealth immunity and federal jurisdiction' (1998) 27 *Federal Law Review* 165, 168.

aspect of claims and/or suits against the Commonwealth, nowhere is it expressly provided that the Commonwealth may be sued or that it is subject to a particular species of substantive liability. That is,

- ?? section 75(iii) of the Constitution states that the High Court has original jurisdiction in matters in which the Commonwealth is suing or being sued
- ?? section 78 of the Constitution states that Parliament may 'make laws conferring rights to proceed against the Commonwealth or a state'
- ?? section 38 JA confers exclusive jurisdiction on the High Court in certain claims against the Commonwealth and s 39 invests state courts with jurisdiction in matters in which the Commonwealth is party under s 75(iii) of the Constitution
- ?? s 56 JA (in respect of the claims against the Commonwealth) and s 58 JA (in respect of claims against a state)<sup>106</sup> specify certain venues for claims against the Commonwealth in tort and contract
- ?? when a suit in respect of such a claim is brought, the rights of the parties shall, as nearly as possible, be the same as in a suit between subjects (s 64).

5.63 The right to sue the Commonwealth has consistently been found by the courts to clearly exist, but the source of the right has been varied and its procedural and/or substantive nature often unclear. While part of the confusion stems from the words of the Constitution itself, inconsistent views about the effect of these words, and opacity in the language of the *Judiciary Act*, are major causes of the inadequacy of the law regarding claims against the Commonwealth.

5.64 The question of whether sections 56 and 64 JA need reform is complicated by the possibility that the Constitution entrenches the rights that are discussed in these sections. More complicated still, judicial opinions have varied as to the extent to which the rights referred to in the *Judiciary Act* are both procedural and substantive and, similarly, whether rights entrenched in the Constitution are procedural and/or substantive. In *Breavington v Godleman*, Mason CJ decided that 'whether s 56 is the source of the Commonwealth's liability in tort, either alone or in conjunction with s 64 JA and perhaps s 75 (iii) and s 78 of the Constitution is a question that I put to one side'.<sup>107</sup> Dawson J similarly concluded that these issues form 'a difficult area and one upon which it is unwise to enter unless it is necessary to do so'.<sup>108</sup> However, the High Court has recently restated the law regarding the source of the Commonwealth's substantive liability and the removal of its immunity from being sued. Consequently the role of the *Judiciary Act* in respect of these matters is called into question.

<sup>106</sup> See also s 67B, discussed in Ch 7, in respect of claims against the Northern Territory.

<sup>107</sup> *Breavington v Godleman* (1989) 169 CLR 41, 69.

<sup>108</sup> *id.*, 152 (Dawson J) also referring to *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

### The impact of federation

5.65 The creation of a federation, the enactment of a federal Constitution, and the separation of powers among the three branches of government, carried with it the implication that the traditional doctrines of English common law with respect to crown immunity may no longer be applicable in the same way as they were in England. This implication was based on the following.

- ?? The United States Supreme Court in *Marbury v Madison*<sup>109</sup> established the principle that it was for the judicial branch of government to decide whether the legislative or executive branches had exceeded their constitutional mandates.<sup>110</sup> This principle was accepted in Australia as ‘axiomatic’ in the *Communist Party Case*,<sup>111</sup> and has been viewed by the High Court as an imperative against the proposition that the Sovereign can do no wrong.<sup>112</sup>
- ?? By separating government into three independently functioning branches, the Constitution eliminated the need for a plaintiff to seek permission to sue the Commonwealth in the High Court. Judicial power was vested in the High Court itself, which consequently was no longer one of the ‘King’s “own” courts’ in the traditional sense.<sup>113</sup>
- ?? As held in *Engineers* the Constitution is ‘by its own inherent force binding on the Crown to the extent of its operation’ and that consequently, ‘laws validly made by authority of the Constitution bind, so far as they purport to do so, the people of every state considered as individuals or as political organisms called states — in other words, bind both Crown and subjects’.<sup>114</sup>

### Competing theses

5.66 There have emerged over time four different theses on the source and scope of the Commonwealth’s substantive liability and the extinguishment of its immunity from being sued. The extent to which these rules apply to the states is also uncertain. A complicating factor when analysing the various views is that there is no clear sense of development in the law. That is, the opinions of courts

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109 (1803) 5 US 137

110 *Commonwealth v Mewett* (1997) 191 CLR 471, 547 (Gummow and Kirby JJ).

111 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J).

112 *Commonwealth v Mewett* (1997) 191 CLR 471, 547.

113 id, 546. M Leeming ‘Liability of the government under the Constitution’ (1998) 17 *Australian Bar Review* 214, 223. See also N Seddon ‘The Commonwealth v Mewett (1997) 191 CLR 471: Common law actions, Commonwealth immunity and federal jurisdiction’ (1998) 27 *Federal Law Review* 165. Despite this, the doctrine of the ‘implied immunity of instrumentality’s’ subject only to statute, extended to the Commonwealth in early common law. See, for example, *D’Emden v Pedder* (1904) 1 CLR 109; *Commonwealth v New South Wales* (1906) 3 CLR 807; *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208; *Attorney-General for New South Wales v Collector of Customs* (1908) 5 CLR 818.

114 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 153.

have not moved from thesis to thesis in a linear fashion, and earlier views have regained currency as the composition of the High Court has changed.

***Commonwealth immunity is removed by the Judiciary Act***

5.67 The most straightforward and commonly held thesis in respect of claims against the Commonwealth is that the procedural right to bring an action for damages in respect of such claim is conferred by s 56 or s 64 JA or both, pursuant to the power granted to Parliament by s 78 of the Constitution. This means that, provided the Commonwealth may be found substantively liable under the common law (as modified by statute), it cannot claim immunity from being sued.<sup>115</sup> According to this thesis, any lack of clarity that exists in either of these two provisions may be straightforwardly resolved by their amendment or replacement. However, the application of any such provision depends upon the existence of substantive liability of the Commonwealth in common law or statute.

***Commonwealth substantive liability is imposed and immunity removed by the Judiciary Act***

5.68 In many of the cases regarding claims against the Commonwealth, the substantive liability of the Commonwealth has not been in issue, and the right of a plaintiff to sue has been dealt with by the Court as a procedural matter only. However, a second thesis, and an extension of this first thesis, is that the substantive liability of the Commonwealth is imposed by sections 56 and 64 of the Commonwealth, again pursuant to s 78 of the Constitution and/or the general legislative rights of the Commonwealth Parliament.<sup>116</sup> According to this theory, the purpose of s 78 was to empower Parliament to enact legislation to remove the Commonwealth's immunity from suit. The procedural right to bring an action for damages in respect of such liability is a necessary consequence of this imposition. The majority of cases either clearly state this view, or condone it by remaining silent on the substantive/procedural distinction. An example is *Baume v Commonwealth*<sup>117</sup>

The *Judiciary Act* 1903, as if to emphasize the equality of subject and Crown in litigation, gave the right directly to the subject to sue the Commonwealth or the State, and declared that when the action was brought, the rights of the person suing were to be the same as in an action against an individual.<sup>118</sup>

115 See *Commonwealth v Mewett* (1997) 191 CLR 471 and the losing argument in *Maguire v Simpson* (1977) 139 CLR 362.

116 See *Maguire v Simpson* (1977) 139 CLR 362, 381 (Gibbs J).

117 (1906) 4 CLR 97. See P Hogg 'Suits against the Commonwealth and the State in federal jurisdiction' (1970) 44 *Australian Law Journal* 425, 426; H E Renfree *The Executive Power of the Commonwealth of Australia* Legal Books Sydney 1984, 531–535; *Daly & Ors v State of Victoria* (1920) 28 CLR 395; *Werrin v Commonwealth* (1938) 59 CLR 150, 166.

118 *Baume v Commonwealth* (1906) 4 CLR 97, 119 (O'Connor J).



5.69 As discussed below in paragraphs 5.109–5.110, the procedural and/or substantive effects of the *Judiciary Act* may be inferred from s 56 alone, s 64 alone, or, as is most common, from sections 56 and 64 together. Again, this thesis permits reform to the law in this area to be effected through legislative amendment. In this case, however, such reform may circumscribe not only the procedural right to sue the Commonwealth, but also the substantive liability underlying such suit.

***Commonwealth substantive liability is imposed by the Constitution***

5.70 A third thesis, developed by the High Court in *Commonwealth v New South Wales*, is that the substantive liability of the Commonwealth is entrenched in the Constitution itself by s 75. Isaacs, Rich and Starke JJ<sup>119</sup> held that

Approaching the matter once more from the standpoint of sec. 75, we see that, as to the cases there set out wherein the Commonwealth and the States are specifically mentioned, it is plain that those organizations are bound — that is, the Crown in the right of them is bound.<sup>120</sup>

5.71 According to this interpretation, s 75(iii) does not simply preempt s 56 JA. Unlike s 56, s 75(iii) is general in its words and thus not limited to claims ‘whether in tort and contract’. While never specifically overruled, this has not proven a popular precedent. It was on one occasion successfully invoked to extend Commonwealth liability to a suit for a declaration,<sup>121</sup> but this decision was not considered by the High Court. Had it been, ‘it is in the highest degree improbable that the Court would have interpreted s 75(iii)’ in this way.<sup>122</sup>

5.72 The decision in *Commonwealth v New South Wales* is generally rejected on the basis that s 75(iii) ‘does not enable actions to be brought...against the Commonwealth, but only provides that, where any such action lies, the High Court shall be a competent court of original jurisdiction’.<sup>123</sup> The Constitution is usually

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119 (1923) 32 CLR 200, 210–214.

120 *Commonwealth v New South Wales* (1923) 32 CLR 200, 214. See also *South Australia v Victoria* (1911) 12 CLR 667.

121 *Australian Airport Services Pty Ltd v Commonwealth* (1976) 10 ALR 167. Section 56 was held to extend only to suits in tort or contract. See para 5.119.

122 L Katz ‘Australian Airport Services Pty Ltd v The Commonwealth and s 56 of the *Judiciary Act*’ (1977) 6 *Adelaide Law Review* 154, 155. See also P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 143; P Hogg ‘Suits against the Commonwealth and the State in the federal jurisdiction’ (1970) 44 *Australian Law Journal* 425, 426; M Leeming ‘Liability of the government under the Constitution’ (1998) 17 *Australian Bar Review* 214, 218. A notable exception is Aitken: ‘The simplest approach, and therefore the best and most likely, would be to treat s 75(iii) as the basis of the liability of the Commonwealth’: L Aitken ‘The liability of the Commonwealth under s.75(iii) and related questions’ (1992) 15(2) *UNSW Law Journal* 483–515, 514. See also L Aitken ‘The Commonwealth’s entrenched liability — further refinements’ (1994) 68(9) *Australian Law Journal* 690–691. See also Z Cowen and Zines *Federal jurisdiction in Australia* 2<sup>nd</sup> ed OUP Melbourne 1978, 35–38; W A Wynes *Legislative, executive and judicial powers in Australia* 5<sup>th</sup> ed Law Book Co Sydney 1976, 455–461.

123 Quick & Garran *Annotated Constitution of the Australian Commonwealth* 1901, 722, quoted in L Katz ‘Australian Airport Services Pty Ltd v the Commonwealth and s 56 of the *Judiciary Act*’ (1977) 6 *Adelaide Law Review* 154, 155.

regarded as deferring the creation of rights of action to Parliament through s 78.<sup>124</sup> It is said that the Constitutional Convention in 1898 deliberately structured the Constitution this way in the belief that Commonwealth liability or immunity should be dealt with in legislation.<sup>125</sup>

[T]he Australian colonists by the turn of the century regarded immunity from suit as a proper object of abolition. For this reason, when the issue of immunity came squarely before our constitution's framers at the Melbourne Convention in 1898 the substantial question they were to decide was not whether the Commonwealth or a State should enjoy immunity from suit in matters of federal jurisdiction but how best to confront immunity — in the constitution itself or through legislation passed under the Constitution. Their answer is contained in the Constitution, s 78.<sup>126</sup>

5.73 The contrary explanation of the Court in *Commonwealth v New South Wales* was that s 78 allows Parliament 'to confer, in respect of all matters within the Federal judicial power, rights that are not already conferred under s 75',<sup>127</sup> such as rights to proceed in federal jurisdiction in Courts other than the High Court. The purpose of s 78 is to allow the Commonwealth Parliament to legislate regarding proceedings not expressly contemplated by the Constitution — or the residue of s 75. Consequently, s 78 does not refer to the right to proceed, but to 'rights to proceed'. To do otherwise would be to permit the Commonwealth Parliament to discriminate regarding liability, for example, to make a state liable to another state or to the Commonwealth without reciprocal liability.<sup>128</sup>

5.74 However, while the decision in *Commonwealth v New South Wales* has never been overruled, subsequent High Courts have 'virtually ignored its reasoning',<sup>129</sup> and its explanation of s 78 has never been adopted. As Hogg puts it

124 See L Aitken 'The liability of the Commonwealth under s 75(iii) and related questions' (1992) 15(2) *UNSW Law Journal* 483–515, 489.

125 P Finn *Essays on law and government Volume 2 'The citizen and the State in the courts'* LBC Information Services North Ryde 1996, 30. See also M Leeming 'Liability of the government under the Constitution' (1998) 17 *Australian Bar Review* 214, 217.

126 P Finn *Essays on law and government Volume 2 'The citizen and the State in the courts'* LBC Information Services North Ryde 1996, 30.

127 (1923) 32 CLR 200, 215 (Issacs, Rich, Starke JJ).

128 *Commonwealth v New South Wales* (1923) 32 CLR 200, (Issacs, Rich, Starke JJ). Higgins J in dissent at 219–220 stated 'to give jurisdiction to a particular Court over actions or matters of a certain character is not to make a matter actionable or justifiable if it is not otherwise actionable or justifiable under some law to which the parties are alike subject; and the King in right of one State is not subject to any law binding him in right of another State, or of the Commonwealth, unless by force of some positive enactment; and sec.78 was designed to supply such an enactment, through the Federal Parliament'. See also L Aitken 'The Commonwealth's entrenched liability — further refinements' (1994) 68 *Australian Law Journal* 690–691.

129 'The decision in *Commonwealth v New South Wales* has never been overruled, although later cases have virtually ignored its reasoning and acted as if s 75 and 78 of the Constitution and s 39, 56 and 64 of the *Judiciary Act*, or some combination of them, is the source of the Commonwealth's liability in tort and contract': McHugh J in *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 217.

There have been occasional suggestions that the provisions of the *Judiciary Act* were unnecessary for the purpose of imposing liability in tort and contract on the Commonwealth and the States in the federal jurisdiction. The basis of this view is that the Constitution, by s 75 (iii) and (iv), accomplishes this result directly. But the orthodox view — held by the great majority of judges and commentators — is that the provisions of the Constitution are jurisdictional only, and that liability is imposed by the *Judiciary Act*. This is undoubtedly the better view.<sup>130</sup>

### ***Commonwealth immunity from suit is removed by the Constitution***

5.75 If the Commonwealth's substantive liability is entrenched in the Constitution, as held in *Commonwealth v New South Wales*, the Commonwealth Parliament cannot extinguish it. A fourth thesis, therefore, was developed subsequently by the High Court in *Werrin v Commonwealth*, so as to avoid this consequence. Dixon J held that s 75(iii) 'treats the liability as already existing in abstracto as a duty of imperfect obligation and made perfect by the creation of a jurisdiction in which the Crown may be sued without its consent'.<sup>131</sup> In other words s 75(iii) removed the immunity of the Commonwealth from being sued without addressing the cause of action in issue. The Commonwealth was thus free to control its liability in legislation.

5.76 This interpretation of s 75 was endorsed recently by a bare majority of the High Court in *Commonwealth v Mewett*. Consequently, in respect of the removal of Commonwealth immunity from suit, much of the force and effect of the *Judiciary Act* has been taken away. The Court stated that

[T]he liability is created by the common law. In respect of that liability, the Constitution applies to deny any operation to what otherwise might be doctrines of Crown or executive immunity which might be pleaded in bar to any action to recover judgment for damages in respect of that common law cause of action.<sup>132</sup>

5.77 Gummow and Gaudron JJ recently confirmed this rule in *Smith v Australian National Line Ltd*.<sup>133</sup> Their Honours held that causes of action in tort 'were created by the common law of Australia and s 75(iii) denied any operation to doctrines of Crown or Executive immunity which otherwise might be pleaded to those actions'.<sup>134</sup>

130 P Hogg 'Suits against the Commonwealth and the State in federal jurisdiction' (1970) 44 *Australian Law Journal* 425, 426.

131 (1938) 59 CLR 150 167–168 (Dixon J). See also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 367 (Dixon J); *Johnstone v Commonwealth* (1979) 143 CLR 398, 405–406 (Murphy J).

132 *The Commonwealth v Mewett* (1997) 191 CLR 471, 550–551 (Gummow, Kirby JJ). McHugh J had hinted at such an interpretation in *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993–94) 179 CLR 155, although confined it to matters arising from the Constitution itself, by stating at 217, that s 75(iii) may enable 'an action to be brought against the Commonwealth in this Court in respect of matters concerning, or not severable from, the scope of the Commonwealth's constitutional powers'.

133 [2000] HCA 58.

134 *id.*, para 16.

***Rebuttal of the presumption or removal of immunity***

5.78 It is important to note that these last two theses, by constitutionally entrenching the removal of crown immunity (albeit to different extents) do more than rebut the presumption of crown immunity. The rule in *Mewett* permanently removes the Commonwealth's immunity from being sued; the rule from *Commonwealth v New South Wales* permanently removes both the Commonwealth's immunity from being sued and entrenches its substantive liability. Both these rules have the consequence of extinguishing certain rights of the Commonwealth to avoid a suit against it, rather than rebutting an immunity from such suit, because they create a new rule which eliminates the need for the immunity to be rebutted in any particular case.

5.79 Such rules also do more than reverse the presumption of immunity because they are rules which do not permit the immunity to be reinstated by statute — they cannot themselves be rebutted.

5.80 In the case of the rule in *Commonwealth v NSW*, the effect upon Commonwealth rights is dramatic, because it is both substantive and procedural in effect, and thus affords the Commonwealth no statutory mechanism by which it can protect itself from being sued as an ordinary citizen. In the case of the rule from *Mewett*, however, there is not such a dramatic alteration of Commonwealth rights, as the Commonwealth can still alter its substantive liability so as to prevent a suit being brought successfully against it. This is the essence of the difference between the two theses, and a reason for the lack of judicial support for the thesis from *Commonwealth v NSW*.

**Question 5.7.** Is the substantive liability of the Commonwealth created by the common law, the *Judiciary Act* or the Constitution?

**Question 5.8.** Is the Commonwealth's immunity from being sued removed by one or more sections of the *Judiciary Act* read in isolation, or must both sections 56 and 64 be read together, possibly with s 75 (iii) of the Constitution?

**Question 5.9.** Should the right to proceed against the Commonwealth be limited in any way? If the Commonwealth's immunity from being sued is removed by the Constitution, could the right be so limited?

***The s 51 (xxxi) hurdle***

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to... (xxxi)  
 The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

5.81 In addition to the possibility that the Commonwealth's liability is entrenched in s 75(iii) of the Constitution, s 51 (xxxi) may invalidate a statutory provision that purports to limit the liability of the Commonwealth in an action for damages. That is, by extinguishing the right of a plaintiff to property in the form of a chose in action,<sup>135</sup> is the Commonwealth acquiring property other than on just terms? In general, s 51(xxix) has been interpreted by the Courts as placing a limitation on the other powers under the Constitution.<sup>136</sup> It has been held that, 'it is in accordance with the soundest principles of interpretation', to treat as inconsistent, any interpretation of other powers which does not comply with the restrictions in s 51(xxix).<sup>137</sup> Similarly, it has been held that it is not permissible for the Commonwealth to adopt a 'circuitous device to acquire indirectly the substance of a proprietary interest without at once providing the just terms guaranteed by s 51(xxix)'.<sup>138</sup>

5.82 In *Werrin v Commonwealth*, although Dixon J did not expressly consider s 51(xxix), he implied that this provision would not generally prevent the Commonwealth extinguishing a cause of action (subject to s 75), and at least not in the instant case, which was a claim for restitution of taxes mistakenly paid. This reasoning also applied to imposition of taxes, including those pursuant to contract, in *Perpetual Executors and Trustees*<sup>139</sup> and *Magrath*<sup>140</sup> and applied in *Mutual Pools*.<sup>141</sup> It was additionally held in *Mutual Pools* that s 51(xxix) does not operate indirectly to exclude from another grant of legislative power, enactment of a law that acquires property, unless the law can be characterised as a law with respect to the acquisition of property.<sup>142</sup> This requirement is not satisfied, for example, where a law enacted pursuant to the corporations power adjusts the rights of corporations and their employees and, incidental to that operation, affects the acquisition of

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135 An intangible personal property right, such as a right to payment under a loan.

136 G Williams *Human rights under the Constitution* OUP Melbourne 1999.

137 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 371–2 (Dixon CJ).

138 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (Dixon J).

139 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1.

140 *Magrath v Commonwealth* (1944) 69 CLR 156, (Rich, McTiernan, Williams JJ).

141 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 173–4 (Mason CJ).

142 *id.*, 188 cited in *Quickenden v O'Connor* [1999] FCA 611 (Lee J).

property.<sup>143</sup> As stated by the majority in *Nintendo Co Limited v Centronics Systems Pty Ltd*,<sup>144</sup>

The cases also establish that a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51(xxxi) of the Constitution.<sup>145</sup>

5.83 In *Georgiadis*, the High Court identified three categories of law that allow the acquisition of property without breaching s 51(xxxi).<sup>146</sup> These are where

- ?? although the law effects an acquisition of property, it is a law of a kind that is clearly within some other head of legislative power, such as a law imposing taxation or a law providing for the sequestration of the estate of a bankrupt<sup>147</sup>
- ?? the law effects an acquisition of a kind that does not permit of just terms, such as a law imposing a penalty by way of forfeiture,<sup>148</sup> or
- ?? the law cannot fairly be characterized as a law for the acquisition of property for a purpose in respect of which the Parliament has power to make laws.

5.84 In *Mutual Pools*, the Court described the latter class of laws as one directed to resolving competing claims, or providing for

the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest.<sup>149</sup>

5.85 However, the Court found in *Georgiadis* that s 44 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (*Comcare Act*), which extinguishes the right of action of an employee against the Commonwealth for

143 *Quickenden v O'Connor* [1999] FCA 612 (Lee J); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 179 (Brennan J); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 306 (Mason CJ, Deane and Gaudron JJ).

144 *Nintendo Co Limited v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ) cited in *Quickenden v O'Connor* [1999] FCA 612 (Lee J).

145 *Nintendo Co Limited v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ) citing *Australian Tape Manufacturers Association Ltd. v Commonwealth* (1993) 176 CLR 480, 510; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 119 ALR 665; *Health Insurance Commission v Peverill* (1994) 119 ALR 680–681; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

146 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 306 (Mason CJ, Deane And Gaudron JJ)

147 Citing *Mutual Pools and Staff Pty Ltd v Commonwealth* (Mason CJ, Deane, Gaudron JJ).

148 See *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 119 ALR 665 (Mason CJ, Deane and Gaudron JJ).

149 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 189 (Deane and Gaudron JJ).

damages resulting from injury, does contravene s 51(xxxi) of the Constitution.<sup>150</sup> That is, s 44 effects an acquisition of property other than on just terms, the property in question being a chose in action, the plaintiff's right to bring an action for damages. This decision was confirmed by the High Court in *Mewett* and again in *Smith v Australian National Line Ltd (ANL)*.<sup>151</sup> The right extinguished was substantive, and derived from the Commonwealth's liability at common law. Therefore, while Parliament may generally legislate in respect of such liability, it cannot do so if this offends s 51(xxxi).

5.86 It should be noted, however, that additional issues were considered by the Court in *ANL*. In this case, the Commonwealth relied on s 54 of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth), which extinguishes the common law liability of the Commonwealth for injuries to employees under the Act. This provision raises similar issues to those raised by s 44 of the *Comcare Act* in *Georgiadis* and *Mewett*.

5.87 The majority of the Court in *ANL* held that s 54 was an acquisition of property by the Commonwealth other than on just terms. This was despite s 13 of the *Seafarers Rehabilitation and Compensation (Transitional Provisions And Consequential Amendments) Act 1992* (Cth), which allowed common law damages claims extinguished by s 54 to be made within six months of the commencing day of the principal Act. While the Commonwealth argued that s 54, read together with s 13, was nothing more than a limitation on actions and thus distinguishable from *Georgiadis* and *Mewett*, the majority disagreed. Gummow and Gaudron JJ (with whom Gleeson CJ, Kirby and Callinan J agreed), held that '[t]he period of grace specified in s 13 was too short and its operation from one employee to the next too capricious to meet the constitutional requirement of just terms'.<sup>152</sup> Kirby J added that, while s 13 certainly delayed the acquisition, 'it did not make it any less an "acquisition" when that time expired and the statutory bar descended'.<sup>153</sup>

5.88 However, Hayne J (with whom McHugh J agreed) accepted the Commonwealth's argument on this point and upheld the application of s 54 against the plaintiff's claim for damages at common law. His Honour held that

[t]he imposition of this time limit did not diminish the appellant's property rights. No matter how wide a practical reach is given to "acquisition", there was none when the Acts commenced and the time limit was imposed. The property rights subsisted

150 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, *Commonwealth v Mewett* (1997) 191 CLR 471.

151 [2000] HCA 58.

152 *id.*, para 50.

153 *id.*, para 91. Note in any case that, 'in *The Commonwealth v Mewett* Gummow and Kirby JJ concluded that even a chose in action which had become barred by a limitation statute in traditional form would retain sufficient substance to answer the description of "property" in s 51(xxxi) were a federal law thereafter to purport to extinguish it': *id.*, para 35. See *Commonwealth v Mewett* (1997) 191 CLR 471, 534–535.

unaffected in their nature, extent and value until, at the end of six months, they were wholly lost. The effect on the appellant's property rights occurred when the right recognised by s 13 of the Transitional Provisions Act came to an end.<sup>154</sup>

5.89 A further argument made by the Commonwealth was that s 54 amended a right that had been continued in force by statute and was thus inherently susceptible to being altered or removed by statute.<sup>155</sup> Unlike the right in *Georgiadis* and *Mewett*, it was a 'fragile kind of statutory interest, short of "property"'.<sup>156</sup> However, the Court rejected this argument because the right in question was held to arise at common law and not by statute.<sup>157</sup> As Kirby J put it, the statute in question 'did not purport to convert the right into a mere creature of federal legislation. It recognised the existence of the common law right prior to and independent of the provisions'.<sup>158</sup>

**Question 5.10.** Following *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 and *Commonwealth v Mewett* (1997) 191 CLR 471 in what circumstances may the Commonwealth Parliament legislate to limited or otherwise affect the substantive liability of the Commonwealth?

**Question 5.11.** As a matter of policy, should the Commonwealth Parliament refrain from enacting legislative provisions that place the Commonwealth in a different position from ordinary citizens or corporations, in respect of its legal liability?

### State immunity under the Constitution and the *Judiciary Act*

5.90 A further issue that arises from the ambiguous wording of the Constitution and the *Judiciary Act* is whether the Commonwealth is empowered the Constitution to legislate with respect to claims against states, as it is with respect to the Commonwealth.

5.91 Within Chapter III there are two possible sources of Commonwealth power to enact s 64 or otherwise to impose substantive liability. First, there is an argument that sections 75 and 76 of the Constitution are sufficient to impose substantive liability or that those sections, together with s 51(xxxix), are the source

<sup>154</sup> id, para 123.

<sup>155</sup> See McHugh J in *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 260 and *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1, 70–74

<sup>156</sup> *Smith v Australian National Line Ltd* [2000] HCA 58, para 82 (Kirby J).

<sup>157</sup> id, para 83 (Kirby J); para 192 (Callinan J).

<sup>158</sup> id, para 83 (Kirby J).



of the power to enact s 64.<sup>159</sup> On this argument, there is no scope for s 64 to impose substantive liability on the states unless a claim against a state falls within federal jurisdiction.

5.92 The prevailing view, however, is that s 78 is the source of the Commonwealth's power to legislate with respect to rights in suits against the states. The issue of how far this power extends has produced a range of interpretations and differing conclusions by the courts.

5.93 In terms of crown immunity from being sued in federal jurisdiction generally, the role of s 78 seems clear. As McHugh J stated in *Mutual Pools*,

The primary purpose of s 78 was to ensure that federal Parliament could remove the immunity of the Crown in right of the Commonwealth or the States from actions of tort or breach of contract.<sup>160</sup>

5.94 On its face, the power in s 78 to confer rights to proceed is directed equally to the Commonwealth and the states, and it was pursuant to s 78 that s 58 JA was enacted.<sup>161</sup> Section 58 JA, in a similar way to s 56 in respect of the Commonwealth, states that

Any person making any claim against a State, whether in contract or in tort...may in respect of the claim bring a suit against the State in the Supreme Court of the State, or (if the High Court has original jurisdiction in the matter) in the High Court.

5.95 The effect of s 58 is complicated by the fact that all Australian states, other than Victoria, had enacted legislation to remove their immunity from tort and contract prior to federation,<sup>162</sup> and such legislation is more general in its language than the *Judiciary Act*. That is, these Acts expressly grant a substantive right of action and relate to all claims against the states, while s 58 has been construed as applying only to claims in tort or contract.<sup>163</sup> However, s 58 applies only to matters of federal jurisdiction arising under sections 75 and 76 of the Constitution, while the various state crown proceedings Acts potentially apply to all state matters. Presumably, in matters of federal jurisdiction, the *Judiciary Act* prevails over the state Acts by virtue of s 109 of the Constitution, whereas in state matters the state Acts will apply because there is no relevant federal law.

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159 *Commonwealth v New South Wales* (1923) 32 CLR 200, 213, 219-220; *Griffin v South Australia* (1924) 35 CLR 200, 204-206, 208-209; *Mutual Pools v Commonwealth* (1994) 179 CLR 155, 216-217.

160 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993-94) 179 CLR 155, 215 (emphasis added).

161 See eg *Commonwealth v New South Wales* (1923) 32 CLR 200, 220-221 (Higgins J).

162 See para 5.14-5.15, 5.45-5.48, 5.106-5.108.

163 *Commissioner of Railways of Queensland v Peters* (1991) 24 NSWLR 407.

5.96 The role of the *Judiciary Act* in claims against the states is more complex still with respect to rights conferred by s 64. First, as discussed below in paragraphs 5.116–5.119, 5.197–5.200 and 5.248–5.274, it is unclear whether s 64 JA picks up the substantive rights of the parties, or only rights of procedure once a suit has been commenced. Second, while s 64 is generally regarded as picking up substantive rights in claims against the Commonwealth,<sup>164</sup> this is not so for claims against the states. While it was once thought that the states and the Commonwealth were bound equally by the *Judiciary Act*,<sup>165</sup> this view no longer prevails.

5.97 The Commonwealth's power to determine the rights, liabilities and immunities of the states is clearly limited, and varies depending on whether the matter at hand is in state or federal jurisdiction.

5.98 In *China Ocean Shipping v South Australia*, Gibbs J stated, regarding s 78, that 'it seems clear that the Parliament has no power to legislate so as to affect the substantive rights of a state *outside* the limits of federal jurisdiction'.<sup>166</sup> Zines similarly states that, even if s 78 were sufficient to authorize the Commonwealth to give the subject a substantive right against the states, 'it is doubtful whether s 64 can validly prescribe the law to be applied in suits by or against a State', because s 78 does not refer to suits brought by the Commonwealth or a state and thus cannot authorize all the operation of s 64 against a state.<sup>167</sup>

5.99 On the other hand, the majority of the High Court in *Evans Deakin Industries* doubted 'whether the Commonwealth Parliament has a general power to legislate to affect the substantive rights of the states in proceedings *in* the exercise of federal jurisdiction'.<sup>168</sup>

5.100 The Constitutional Commission concluded that both views were correct. Section 78 does not empower the Commonwealth to confer substantive rights regarding the states outside federal jurisdiction, and has only limited power to do so within federal jurisdiction, in those matters where the state is a defendant, and which arise strictly under sections 75 and 76 of the Constitution. The Commission concluded that 'there can be no question of a general law under s 78, that lays down the substantive rights of the states in *all* proceedings in federal jurisdiction'.<sup>169</sup> Such a view limits the operation of sections 58 and 64 JA, in claims against the states, to procedural rights in suits within federal jurisdiction.

164 See *Maguire v Simpson* (1977) 139 CLR 362; *Commonwealth v Evans Deakin Industries* (1986) 161 CLR 254; *Dao v Australian Postal Commission* (1987) 162 CLR 317; *Bropho v Western Australia* (1990) 171 CLR 1; *Commonwealth v Western Australia* (1999) 196 CLR 392.

165 See P Hogg 'Suits against the Commonwealth and the State in the federal jurisdiction' (1970) 44 *Australian Law Journal* 425, 426.

166 (1979) 27 ALR 1, 24 (emphasis added).

167 L Zines *The High Court and the Constitution* 4<sup>th</sup> ed Butterworths Sydney 1997, 370.

168 *Commonwealth v Evans Deakin Industries* (1986) 161 CLR 254, 264. See also *Maguire v Simpson* (1977) 139 CLR 362, 401.

169 Constitutional Commission *Final Report of the Constitutional Commission* AGPS Canberra 1988, 421-424. Original emphasis.

5.101 In contrast, the New South Wales Supreme Court in *Commissioner of Railways of Qld v Peters*<sup>170</sup> held that s 64 JA was a source of substantive liability of the state to a claim pursuant to the *Workers Compensation Act 1926* (NSW). The Court referred to s 78 in support of this finding, despite their additional finding that the claim did not fall within s 58 JA, not being a claim in contract or tort.<sup>171</sup> Such a decision requires a broad view of s 64 to be taken in addition to a broad view of s 78.<sup>172</sup>

5.102 A further approach is that the Melbourne convention debates (discussed above in paragraphs 5.15–5.16) show that s 78 was intended to confer power on the Commonwealth to subject the Crown in all its capacities to suits in federal jurisdiction, and to impose liability in tort upon them. However, the Commonwealth is not empowered to subject the states to statutes that would not otherwise bind them. This would require a separate head of power under the Constitution.

5.103 On this argument, the decision in *Peters* is wrong because the Commonwealth may not impose on the Crown in right of Queensland a statute of another state when the terms of that statute do not expressly or impliedly purport do so. Consequently, even in federal jurisdiction the Commonwealth may not unilaterally subject a state to statutory liability — it may only subject the state to being sued. Some support for this argument can be found in the wording of s 78, which limits its operation to proceedings ‘against’ a state.

**Question 5.12.** To what extent may the Commonwealth legislate with respect to the substantive liability of the states? Is this power derived from s 78 of the Constitution or elsewhere in Commonwealth law?

**Question 5.13.** Does the *Judiciary Act*, in sections 58 and 64, confer substantive or merely procedural rights in claims against the states?

**Question 5.14.** Should the *Judiciary Act* be amended to clarify its role in claims against the states? If so what should that role be?

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170 *Commissioner of Railways of Qld v Peters* (1991) 24 NSWLR 407.

171 *id.*, 429 (Kirby P).

172 See S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1988, para 7.1, para 8.5.2.

## Immunity from being sued<sup>173</sup>

5.104 In the United Kingdom, the immunity of the Crown from being sued began to erode in the 13<sup>th</sup> century with the introduction of the ‘petition of right’ procedure,<sup>174</sup> by which a subject could seek the monarch’s consent (or ‘royal fiat’) to bring an action against it to enforce a right which would be recognized by law if enforced against another subject.<sup>175</sup> Consequently, in respect of contract and some other non-tortuous claims,<sup>176</sup> the Crown could waive its immunity and allow a suit for damages to be brought against it. The hurdle presented by the petition procedure was rarely a bar to such claims as, at least by the 19<sup>th</sup> century, the general policy of the Crown was to consent to proceedings if an arguable case was presented.<sup>177</sup>

5.105 In Australia, the immunity of the Crown from being sued was eroded further by colonial legislation. The distinction between procedural and substantive aspects of immunity became blurred. After federation, with some notable exceptions, the relevant *Judiciary Act* provisions were interpreted by the courts as the source both of the Commonwealth’s substantive liability in tort and contract<sup>178</sup> and of a claimant’s right to commence legal proceedings against the Commonwealth.

## Immunity from being sued in colonial Australia

5.106 Professor Paul Finn described the immunity doctrine in the colonies as being attacked not ‘root and branch’, but through ‘the cumulative effect of a number of crab-like moves’. The early legislation was general in its terms and did not clearly extend beyond actions for damages for breach of contract.<sup>179</sup> The first major

173 It should be noted that there are certain entities other than the Crown that benefit from immunities in a variety of circumstances. In particular, foreign States and diplomatic and consular officers of foreign States may be immune from civil action in certain circumstances. See *Foreign States Immunities Act 1985* (Cth) s 9; *Consular Privileges & Immunities Act 1972* (Cth) s 5; *Diplomatic Privileges and Immunities Act 1967* (Cth), s 7.

174 A process formalised by the *Petitions of Right Act 1860* (UK).

175 L Jaffe ‘Suits against government officers: Sovereign immunity’ (1963) 77 *Harv LR* 1, 3–5. The only alternative was to petition the Attorney-General for a declaration; or by actions against ministers and government departments which had been incorporated or declared liable to suit by statute: *Halsbury’s Laws of England* 3<sup>rd</sup> ed Vol 11 Butterworths London 1955, Pt 1, s 1, 3.

176 Such as claims arising out of property rights (eg detainee), quasi contract and recovery of payments: *The Laws of Australia* LBC Vol 19.3, 92. The substantive common law liability of the Crown in contract was rarely in issue: P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 159.

177 At least by the 19th century, see M Leeming ‘Liability of the government under the Constitution’ (1998) 17 *Australian Bar Review* 214, 215; P Finn ‘Claims against the government’ in *Law and government in colonial Australia* OUP Melbourne 1987.

178 and other common law claims.

179 P Finn ‘Claims against the government’ in *Law and government in colonial Australia* OUP Melbourne 1987, 142.

development in the law began in 1866, when the petition of right process<sup>180</sup> was replaced by an entitlement as of right to commence proceedings against the Crown. Queensland and NSW, in 1866 and 1876 respectively, enacted legislation<sup>181</sup> that eliminated the Governor's statutory discretion to refuse to allow a claim to go to trial.<sup>182</sup> Similar legislation was enacted in Tasmania in 1891,<sup>183</sup> replacing 1859 legislation that expressly limited claims to contract.<sup>184</sup> However, Western Australian and Victorian legislation did not follow. On the one hand, Western Australia retained the Governor's discretion until 1898,<sup>185</sup> while on the other hand, Victoria retained immunity from tort until 1955.<sup>186</sup>

5.107 In 1887, the general right to sue a colonial government as if it were an ordinary subject, including for damages in tort, was confirmed by the majority decision of the *New South Wales* Supreme Court in *Bowman v Farnell*<sup>187</sup> and upheld by the Privy Council on appeal.<sup>188</sup> The Privy Council recognized that, 'if...the maxim that 'the King can do no wrong' were applied to colonial governments...it would work much greater hardship than it does in England'.<sup>189</sup> As Finn put it

The raw conditions of the colonies, the patterns of settlement and investment, and the imperatives of development impelled governments into activities which were without counterpart in Britain or which in that country were conducted by local government, private enterprise or private and charitable organizations.<sup>190</sup>

5.108 Initially, the decision in *Bowman v Farnell* was read down in subsequent cases.<sup>191</sup> It was held that procedural orders, such as discovery and interrogatories,<sup>192</sup> and injunctions,<sup>193</sup> either could not be made, or were unenforceable against the nominal defendant. However, these decisions were not

180 Initially colonial Crown proceedings acts codified the common law petition of right procedure: *Claims against the Local Government Act 1853* No 6 of 1853 (SA); *Claims Against the Government Act 1857* 20 Vic 15.

181 *Claims Against the Government Act 1866* (Qld) 29 Vic No 238; *Claims Against the Crown Act 1876* (NSW).

182 See *Claims Against the Crown Act 1861* (NSW) 24 Vic No 27. P Finn 'Claims against the government' in *Law and government in colonial Australia* OUP Melbourne 1987, 144.

183 *Crown Remedies Act 1891* 55 Vic 24 (Tas).

184 *Crown Redress Act 1859* 23 Vic 1.

185 *Crown Suits Act 1898* (WA).

186 Note that Crown liability to tort in Victoria is vicarious rather than direct, precluding certain claims, such as for damages from occupier's liability: M Leeming 'Liability of the government under the Constitution' (1998) 17 *Australian Bar Review* 214, 217.

187 (1886) 7 NSWLR (L) 1.

188 *Farnell v Bowman* (1887) 12 App Cas. 643.

189 id, 649.

190 P Finn *Essays on law and government Volume 2 The citizen and the State in the courts* LBC Information Services North Ryde 1996, 30.

191 The champions of the *Bowman v Farnell* decision, Faucett and Manning JJ, retired not long after the decision.

192 Such orders were denied by the Court until the precedent was overturned in *Morissey v Young* (1896) 17 NSWLR (Eq) 157. The Court also denied the claim that such order, if made, was unenforceable.

193 *Evans v O'Connor* (1891) 12 NSWLR (L) 81.

followed after federation,<sup>194</sup> and the principles of equality between Crown and subject in legal proceedings gradually became the accepted rule.<sup>195</sup>

## Commonwealth immunity

### *Rebutting the presumption of immunity from being sued*

5.109 As discussed above, there are a number of theories as to the source of removal of the Commonwealth's immunity from being sued.<sup>196</sup> The most common theory is that the immunity is removed by federal legislation enacted pursuant to s 78 of the Constitution — namely, the *Judiciary Act*. It should be noted that, in the context of claims against the Commonwealth, the *Judiciary Act* was preceded by the *Claims Against the Commonwealth Act 1902* (Cth), and was similar in its provisions to sections 56 and 64 JA, but retained the petition procedure.<sup>197</sup>

5.110 The *Claims Against the Commonwealth Act 1902* was repealed by the *Judiciary Act* in 1903. Three sub theories have emerged as to the operation of the *Judiciary Act* in removing the immunity.

?? The right to proceed is conferred by s 56 JA alone. That is, the statement in s 56 that *if* a claim is made, 'whether in tort and contract', jurisdiction is conferred on certain courts, is interpreted as meaning also *that* a claim may be made.<sup>198</sup> Section 56 is preferred to s 64 as the latter refers to the substantive right underlying a suit, not merely to rights that apply once a suit has been brought.

194 *Strahorn v Williams* (1908) 25 WN (NSW) 49; *Bradley v Commonwealth* (1973) 128 CLR 557.

195 Note, however, that an issue remained as to whether writs of mandamus, where performance of a statutory obligation of a government agency is sought, lie against the Crown or the individual officer in question: P Finn 'Claims against the government' in *Law and government in colonial Australia* OUP Melbourne 1987, 146. Even in recent High Court cases (such as *Commonwealth v Mewett* (1997) 191 CLR 471), the relationship between s 75(iii) of the Constitution, and s 75(v) which deals with writs of mandamus, has not been resolved. See M Leeming 'Liability of the government under the Constitution' (1998) 17 *Australian Bar Review* 214.

196 Some of which include imposition of substantive liability on the Commonwealth, discussed in its various forms separately below.

197 Clause 1 of the Act stated that claimants must petition the Governor-General to appoint a nominal defendant to answer claims against the Commonwealth. If this occurred, the rights of the parties were those between subject and subject (cl 3 (2)) in similar terms to those subsequently set down in s 64 JA 1903.

198 For example Brennan J in dissent in *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 271, Dawson J in *Breavington v Godleman* (1988) 62 ALJR 447, 488; Windeyer J in *Seuhle v Commonwealth* (1967) 116 CLR 353, 355; Dixon J in *James v Commonwealth* (1939) 62 CLR 339, 359. See also *Washington v Commonwealth of Australia* (1939) 39 SR (NSW) 133, 142; *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 357–358; *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 424; *Downs v Williams* (1971) 126 CLR 61, 82; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 318 Toohey J.

- ?? The right to proceed is conferred by s 64 JA alone.<sup>199</sup> Section 64 refers generally to ‘any suit to which the Commonwealth or state is a party’. For this reason, it is often preferred as a right of action to s 56, which is arguably limited to conferring jurisdiction, and in tort and contract claims only. For example, it has been held that ‘it was s 64, unaided by s 56’ that rendered the Commonwealth liable to a modified tort claim.<sup>200</sup>
- ?? The right to proceed is conferred by sections 56 and 64 read together.<sup>201</sup> Cross-referring these two sections has two consequences. First, it generalises the practical operation of s 56 to ‘any suit’. Second, it extends the rights conferred by s 64 to the claim underlying the suit. That is, s 56 ensures that s 64 is not procedural only, and s 64 makes it clear that sections 55–59 are not intended to be jurisdictional only, or limited to tort and contract.<sup>202</sup>

5.111 An alternative theory, and that preferred by the majority of the High Court at present, as set down in *Mewett’s* case, is that the Commonwealth’s immunity from being sued was removed by s 75(iii) of the Constitution. The *Judiciary Act* provisions are, therefore, merely reflections or expansions of rights that are constitutionally entrenched — indeed, s 75(iii) may be broader in its procedural effect than the *Judiciary Act* provisions.

5.112 According to any of these theories,<sup>203</sup> Parliament may legislate to redraw the underlying substantive liability of the Commonwealth. As Justice McHugh put it recently in *Georgiadis*, ‘in the light of s 78 of the Constitution, it is difficult to see why the Commonwealth cannot extinguish any accrued right of action in tort against itself’.<sup>204</sup> However, there is a significant difference between the theories centred on the *Judiciary Act* and the theory from *Mewett’s* case. Following *Mewett*, if the Commonwealth does not legislate to extinguish or limit its liability, it is

199 *Sargood Bros v Commonwealth* (1910) 11 CLR 258, 309–310 (Higgins J); *Moore v Commonwealth* (1958) 99 CLR 177, 182–183; *Maguire v Simpson* (1977) 139 CLR 362, 381, 404–405; *Groves v Commonwealth* (1982) 150 CLR 113, 119. See also Dixon J in *Commonwealth v Mewett* (1997) 191 CLR 471, 502.

200 *Maguire v Simpson* (1977) 139 CLR 362, 381 (Gibbs J referring to *Baume v Commonwealth* (1906) 4 CLR 97, *Parker v Commonwealth* (1965) 112 CLR 295 and *Seuhle v Commonwealth* (1967) 116 CLR 353). See also *Asiatic Steam Navigation Co Ltd v Commonwealth* (1957) 96 CLR 397, 414–421 (Dixon, McTiernan, Williams JJ), 427 (Kitto J). See also the majority in *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 264, following the reasoning in *Maguire v Simpson* (1977) 139 CLR 362.

201 *Baume v Commonwealth* (1906) 4 CLR 97, 110, 118; *Pitcher v Federal Capital Commission* (1928) 41 CLR 385, 391, 392–393, 395–396; *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 352–353; *Parker v Commonwealth* (1965) 112 CLR 295, 300; *Downs v Williams* (1971) 126 CLR 61, 99; *Groves v Commonwealth* (1982) 150 CLR 113, 121–122; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Commonwealth v Mewett* (1997) 191 CLR 471.

202 See P Hogg ‘Suits against the Commonwealth and the State in federal jurisdiction’ (1970) 44 *Australian Law Journal* 425, 426, fn 10.

203 But not to that espoused in *Commonwealth v New South Wales*, as discussed in para 5.70–5.74.

204 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 326 (McHugh J).

prevented by s 75(iii) of the Constitution from claiming immunity from an action for damages where such liability may be established.

5.113 As discussed above in paragraph 5.77, this aspect of the decision in *Mewett* was confirmed by Gummow and Gaudron JJ recently in *Smith v Australian National Line Ltd*.<sup>205</sup> While *Mewett* was upheld by the Court generally in *Smith v Australian National Line Ltd*, the question whether the Commonwealth's immunity from being sued is removed by s 75(iii) of the Constitution was not considered by the other justices.

### ***The impact of Mewett on the Judiciary Act***

5.114 For many years, the substantive and procedural rights activated by a claim against the Commonwealth were firmly embedded in the *Judiciary Act*. While the extent of such rights has created controversy,<sup>206</sup> their source and the distinction between them have rarely been significant in judicial decisions. However, as a consequence of *Mewett*, the liability and immunity of the Commonwealth are to be seen as distinct concepts with separate sources in the law. As the High Court put it recently in *Abebe v Commonwealth*, '[t]he distinction between right and remedy is deeply embedded in the corpus of the law. This is apparent in the law with respect to Crown liability ...'.<sup>207</sup>

5.115 This distinction leaves the purpose and effect of the *Judiciary Act* provisions in a state of uncertainty. Regarding the Commonwealth's substantive liability, the majority in *Mewett* stated that 'section 56 of the *Judiciary Act* recognizes, rather than provides the source of, Commonwealth liability'.<sup>208</sup> Regarding the immunity from being sued, their Honours stated 'section 64 of the *Judiciary Act* further advances the denial by the Constitution of the immunity doctrine'.<sup>209</sup> Whether the *Judiciary Act* is necessary to the existence of 'the immunity doctrine' may be doubtful.

### ***The ambit of the Judiciary Act***

5.116 Following *Mewett*, it is no longer certain that the right to sue the Commonwealth is dictated purely by the *Judiciary Act*. To the extent that such right is entrenched in the Constitution, reforms to the *Judiciary Act* may have little or no effect. However, the decision in *Mewett* was by a narrow majority, and

205 [2000] HCA 58, para 16.

206 Particularly in the light of the decision in *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

207 *Abebe v Commonwealth* (1999) 197 CLR 510, 562, citing *Mewett* and *Werrin* as discussed in para 5.75-5.76; *Werrin v Commonwealth* (1938) 59 CLR 150 at 167-168 per Dixon J; *Commonwealth v Mewett* (1997) 191 CLR 471, 549-550 (Gummow and Kirby JJ).

208 *Commonwealth v Mewett* (1997) 191 CLR 471, 551 (Gummow and Kirby JJ).

209 *id*, 552 (Gummow and Kirby JJ).



subsequent decisions, such as *Smith v Australian National Line Ltd*, have added little to the certainty of the law in this respect. For Justices Dawson, McHugh and Toohey, s 75 of the Constitution confers jurisdiction only. Both the liability of the Commonwealth and its exposure to suit are created by sections 56 and 64 JA, pursuant to s 78 of the Constitution, and ‘causes of action against the Commonwealth in tort owe their existence entirely to federal legislation’.<sup>210</sup>

5.117 Assuming that the *Judiciary Act* is, or may again be, a source of substantive and procedural rights, two general issues remain. First, the issue of whether the words ‘whether in contract or tort’ in s 56<sup>211</sup> are exhaustive or merely illustrative. Second, the issue of whether s 64 must be read together with s 56 to impose liability and thus whether it is procedural or substantive in effect. Related to this issue is a third more specific question, namely the extent to which s 64 may apply a statute to the Crown. This latter issue is discussed in detail in paragraphs 5.197–5.200 and 5.248–5.261.

#### **Claims not ‘in contract and tort’**

5.118 Issues of Commonwealth liability and immunity are not limited to ordinary suits for damages in tort and contract — for example, they may extend to restitutionary claims. There is some doubt as to whether the words ‘in contract or in tort’ in s 56 JA are intended to exclude other types of claims,<sup>212</sup> but generally the phrase has been given a liberal meaning. Consequently, s 56 has been interpreted over the years to apply to a range of claims, including actions to recover income tax; compensation for land taken or injuriously affected by a railway company; claims for repayments of moneys exacted in contravention of s 92 of the Constitution, and negligent non-payment of stamp duty; and claims in quasi-contract and for breach of trust.<sup>213</sup>

5.119 The argument that s 56 limits Commonwealth liability in contract and tort was put by the defendant and conceded by the plaintiff in *Australian Airport Services Pty Ltd v Commonwealth*,<sup>214</sup> in respect of *New South Wales Supreme*

210 Consequently, ‘the liability of the Commonwealth in tort was subject to extinguishment by s 44(1) of the Comcare Act’: *Commonwealth v Mewett* (1997) 191 CLR 471, 532 (McHugh).

211 Note that these words also appear in sections 57–59.

212 See *Washington v Commonwealth* (1939) 39 SR (NSW) 133, 141; *Froelich v Howard* [1965] ALR 1117, 1119. See also criticism by P Hogg ‘Suits against the Commonwealth and the State in the federal jurisdiction’ (1970) 44 *Australian Law Journal* 425, 426.

213 See H E Renfree *The Executive Power of the Commonwealth of Australia* Legal Books Sydney 1984, 534 and *Deputy Commissioner of Taxation v Establishments Lecorche Freres* (1954) S.R. Q’d 314 (for income tax); E Bullen and s Leakes *Precedents of pleadings* 3<sup>rd</sup> ed Stevens & Sons London 1868, 145 (compensation for land injuriously taken); *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 103 (moneys exacted in contravention of s 92); *State of Victoria v Hansen* [1960] VLR 582. See also *Schweppes Ltd v Commonwealth* (1945) 45 SR (NSW) 35; *Froelich v Howard* [1965] ALR 1117 (negligent non-payment of stamp duty); *Daly v Victoria* (1920) 28 CLR 395, 399; *Werrin v Commonwealth* (1938) 59 CLR 150 and *Mason v New South Wales* (1959) 102 CLR 108 (quasi-contract and breaches of trust).

214 (1976) 10 ALR 167.

Court proceedings seeking a declaration of right regarding fixtures on real property. Yeldham J accepted this in his judgment, apparently on the basis that ‘although the Commonwealth had submitted itself to actions for damages by s 56, it had not submitted itself to actions for declarations, because bringing the latter type of action was not “making a claim” within the meaning of s 56’.<sup>215</sup> This narrow interpretation of s 56 has been criticised as being contrary to the parliamentary debates and to s 64 JA,<sup>216</sup> and as founded on the illogical premise that the Commonwealth would submit to some kinds of liability but not to other, less onerous kinds.

It would be very strange if the Commonwealth parliament, at the same time as it extended the liability of the Commonwealth to claims in tort for which the Crown at common law was not liable, excluded liability for some claims for which the Crown at common law was liable.<sup>217</sup>

**Question 5.15.** Should s 56 of the *Judiciary Act* and related sections be limited to actions ‘in contract or in tort’?

**Question 5.16.** What provision should be made in s 56 or elsewhere in the *Judiciary Act* for claims, other than contract or tort claims, arising under the common law?

**Question 5.17.** What provision should be made in s 56 or elsewhere in the *Judiciary Act* for claims arising under statute?

**Question 5.18.** If the right to proceed against the Commonwealth is guaranteed by s 75(iii) of the Constitution, is this right broader than that conferred by s 56 of the *Judiciary Act*, which specifies claims in tort and contract only, and s 64 of the *Judiciary Act*, which is limited to ‘suits’? Should these sections be amended to reflect the broader position?

### *Claims not ‘suits between subject and subject’*

5.120 Claims may also extend into areas of Commonwealth governmental activity for which other traditional crown prerogatives apply. The status of some such claims may be determined by applying s 64 JA. That is, the claims may not be those which could arise in analogous circumstances between ‘subject and subject’.

215 L Katz ‘Australian Airport Services Pty Ltd v the Commonwealth and s 56 of the *Judiciary Act*’ (1977) 6 *Adelaide Law Review* 154, 154. Yeldham J stated that s 56 ‘appears to contemplate a claim for the recovery of damages in contract or in tort’: (1976) 10 ALR 167, 171.

216 id, 155. As discussed above, Yeldham J controversially found that s 75(iii) carries sufficient generality to ground a claim for declaration.

217 P Hogg *Liability of the Crown* 2<sup>nd</sup> ed LBC Ltd North Ryde 1989, 143.

Examples include claims for priority over Crown debts,<sup>218</sup> claims over Commonwealth defence force land<sup>219</sup> and claims regarding intergovernmental agreements which are not intended to impose legally binding obligations.<sup>220</sup>

5.121 In such cases, the meaning of the words ‘as nearly as possible’ in s 64 is in issue. The High Court in *Commonwealth v Evans Deakin Industries* broadened the scope of s 64 so that there are very limited circumstances in which the Commonwealth could successfully assert that a claim against it was not of a kind possible against an ordinary citizen.<sup>221</sup>

5.122 The meaning of the phrase ‘as nearly as possible’ does not merely pertain to the subject matter of the claim, but also to the types of right asserted, including substantive rights. The effect of s 64 in respect of such rights is discussed in paragraphs 5.197–5.200 and 5.248–5.274.

**Question 5.19.** In s 64 of the *Judiciary Act*, when does a matter arise between ‘subject and subject’? Does this terminology continue to be appropriate? Are there better ways of expressing the underlying principle of equality before the law?

**Question 5.20.** Should claims against the Commonwealth be limited to matters which may arise between subject and subject? If not, what exceptions, if any, should apply?

**Question 5.21.** What functions do sections 56 and 64 of the *Judiciary Act* serve if they do not remove the Commonwealth’s immunity from being sued?

**Question 5.22.** Should sections 56 and 64 be repealed and replaced with a provision that clearly states that a person may bring proceedings against the Commonwealth in respect of any claim, and that the rights of the parties (whether procedural or substantive) shall be the same as in a suit between ordinary persons? If not, what should they provide?

218 *Commonwealth v Lawrence* (1960) 77 WN (NSW) 538, 540. See S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 287.

219 In *Commonwealth v Western Australia* (1999) 196 CLR 392.

220 *South Australia v Commonwealth* (1962) 108 CLR 130, 140.

221 The Court relied on *Maguire v Simpson* (1977) 139 CLR 362 and *Kitto J in Asiatic Steam Navigation Co. Ltd v Commonwealth* (1977) 139 CLR 362.

**Question 5.23.** If a general right to proceed against the Commonwealth were conferred by statute, would s 56 serve any continuing purpose in specifying the venue for actions against the Commonwealth? Is the issue of venue effectively dealt with through other laws, such as that conferring jurisdiction on federal and state courts, and those ensuring that matters are heard in the most appropriate forum?

## Immunity from tort and contract

### Immunity from contract

5.123 Unlike tortious liability, the Crown's liability in contract has been clearly recognised since the establishment of the Australian colonies. In the United Kingdom, the petition of right similarly extended to contractual claims far sooner than it did tortious claims. This may be explained in historical terms by the fact that the recognition of contracts with the Crown to a large extent grew out of property rights recognised by the Crown rather than from notions of breach of duty. Consequently, it seems that the doctrine 'the King can do no wrong' did not encompass wrongful conduct in respect of contractual obligation. In the Middle Ages, the majority of petitions of right were granted in respect of property rights, typically where the King had seized or otherwise taken possession of land to which the petitioner had lawful tenure. However, claims often extended beyond basic property rights, to compensation for loss of rent or annuity or other claims of a contractual or quasi contractual nature.<sup>222</sup>

5.124 It was established in the *Bankers' Case* that, in respect of claims for legal remedy pursuant to a contract, the rights of 'King against subject' should apply equally to 'help and relieve the subject when he produces a legal title against the King'.<sup>223</sup> This 'salutary principle'<sup>224</sup> was applied again to contract claims in the latter part of the 18<sup>th</sup> Century,<sup>225</sup> and was developed further in the 19<sup>th</sup> Century through the revival of the petitions of right process.

5.125 In early 19<sup>th</sup> Century English cases, the remedy of petition of right in contract was assumed. The Queen's Bench adopted it when it was finally judicially considered in 1874 in *Thomas v The Queen*.<sup>226</sup> There has been no controversy regarding contract claims since this case. Inclusion of contract in the petition of right procedure was expressed in the first colonial Australian crown proceedings

<sup>222</sup> W Holdsworth 'The history of remedies against the Crown' (1922) 38 *LQR* 141, 152.

<sup>223</sup> *The Banker's Case* (1700) 14 ST, 109.

<sup>224</sup> W Holdsworth 'The history of remedies against the Crown' (1922) 38 *LQR* 141, 290

<sup>225</sup> For example *Macbeth v Haldimand* (1786) 1 TR 176.

<sup>226</sup> (1874) LR 10 QB 31.

Acts,<sup>227</sup> and it was clear that ‘the crown is liable in contract at common law. There is no history of immunity, as in the case of tortious liability...the petition of right would lie against the Crown for breach of contract, even if the claim were for unliquidated damages’.<sup>228</sup> While the Crown’s immunity from tort was often preserved, either in the express words of the statute or by implication as construed by the courts, the immunity from contract was never in doubt.

5.126 Following federation, the *Claims Against the Commonwealth Act 1902* (Cth) and then the *Judiciary Act* both conferred rights to sue the Commonwealth in contract. As discussed in detail above, s 56 of the latter Act conferred jurisdiction in ‘a claim against the Commonwealth whether in tort or contract’, and s 64 provided that the rights on the parties in suits against the Commonwealth be ‘as nearly as possible the same...as in a suit between subject and subject’.

### ***Comparative reform***

5.127 In relation to contract law, the Ontario Law Reform Commission report reiterated the general theme that the Crown and its agents or servants should be subject to all contractual liability to which they would be liable if the Crown were a person of full age and capacity.<sup>229</sup> Other reform proposals included legislation that provides that a contract made on behalf of the Crown is valid and enforceable even if the contract fetters discretionary powers conferred by statute or common law; and a recommendation that an appropriate scheme of indemnity for Crown employees should apply with respect to contractual liability of Crown servants and agents, as well as to torts.<sup>230</sup>

**Question 5.24.** Should legislation be enacted to clarify the Commonwealth’s substantive liability for breach of contract? If so, are there any circumstances in which the Commonwealth ought not to be liable by virtue of its status as ‘the Crown’.

227 *Claims Against the Government Act 1866* (Qld) 29 Vic No 23; *Claims Against the Colonial Government Act 1876* (NSW), *Claimants Relief Act 1853* (SA), *Claims Against the Crown Act 1858* (Vic), *Crown Redress Act 1891* (Tas), *Crown Suits Act 1898* (WA).

228 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 159. Queensland and New South Wales in 1866 and 1876 respectively enacted legislation; *Claims against the Local Government Act* (SA); *Claims Against the Government Act 1857* 20 Vic 15; *New South Wales Claims Against the Crown Act 1861* 24 Vic No 27; *Claims Against the Government Act 1866* (Qld) 29 Vic no 238; *Claims Against the Crown Act 1876*; *Crown Redress Act 1959* 55 Vic 24 (Tas), *Crown Redress Act 1859* 23 Vic 1 (Tas)

229 Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 44.

230 id, 47.

## Immunity from tort

### *Erosion of the basic rule of crown immunity*

5.128 In the United Kingdom, a petition of right was for many centuries not a useful procedure for plaintiffs seeking remedies for torts committed by the Crown because the Crown's substantive liability was extinguished by the maxim that 'the King can do no wrong'. No other means of suing the Crown in tort was available, so the Crown was immune from such claims.<sup>231</sup> The Courts similarly held that the King could not authorize a tort, so he could not be found vicariously liable. Crown servants committing torts were presumed to be acting outside Crown authority and held personally liable.<sup>232</sup>

5.129 In the 19<sup>th</sup> Century, the expansion of government activity in constructing and maintaining public works and facilities, and assumption of Crown responsibility by government, dramatically increased the need for remedies for torts committed by the Crown.<sup>233</sup> The House of Lords eroded the immunity somewhat by allowing, for example, petitions of right to enforce a statutory duty to pay compensation.<sup>234</sup> However, this 'serious defect in the law'<sup>235</sup> was not abolished in the United Kingdom until enactment of the Crown Proceedings Act 1947 (UK),<sup>236</sup> which also abolished the petition procedure and the requirement of a royal fiat to sue. The principal alteration brought about by this Act was to place the Crown, subject to certain provisions, in the same position as its subjects. The Crown was therefore 'subject to liability in tort in respect of Her Majesty's government in the United Kingdom to much the same extent...as that to which it would be subject if it were a private person of full age and capacity'.<sup>237</sup>

5.130 Removing or otherwise affecting crown immunity from tort in the United Kingdom was a relatively simple proposition. With no federal structure and no written Constitution, the presumption of immunity could clearly be altered by an Act of the United Kingdom Parliament. In Australia, the federal system and the written Constitution created a more complex situation. One complexity was the tendency of state courts to read the similarly worded statutory provisions differently. These differences were pronounced in relation to tortious actions against the Crown.

231 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 80.

232 W Holdsworth 'The history of remedies against the Crown' (1922) 38 *LQR* 141, 293.

233 *Halsbury's Laws of England* 3<sup>rd</sup> ed Vol 11 Butterworths London 1955 Pt 1, s 1, 3.

234 *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508. W Holdsworth 'The history of remedies against the Crown' (1922) 38 *LQR* 141, 295.

235 P Hogg *Liability of the Crown* 2<sup>nd</sup> ed LBC Ltd North Ryde 1989, 6.

236 Described as 'incomplete...inelegant': P Finn *Law and government in colonial Australia* OUP Melbourne 1987, 141.

237 *Halsbury's Laws of England* 3<sup>rd</sup> ed Vol 11 Butterworths London 1955, Pt 1, s 1, 4; *Crown Proceedings Act 1947* (UK) (10 & 11 Geo 6 cl 44) s 2, citing *Viscount Canterbury v Attorney-General* (1843), 1 Ph 306; *Tobin v R* (1864) 16 CBNS 310; *Feather v R* (1865) 6 B & s 257.

5.131 In respect of the *Claims Against the Government Act 1866* (Qld),<sup>238</sup> which allowed ‘any just claim or demand’ against the Crown, the Queensland Supreme Court recognised the right to sue for torts. However, in respect of the *Claims Against the Colonial Government Act 1876* (NSW),<sup>239</sup> which more broadly allowed ‘any just claim or demand whatever’, the *New South Wales* Court was divided. Some judges found that the statute clearly included tort actions, but others adhered to the concept that such actions were effectively against the Queen, who cannot be bound without her consent. In other words, the legislation was regarded as procedural rather than substantive in effect,<sup>240</sup> and ‘as long as ten years after the passing of the Act in that colony, counsel were to conduct litigation against individual public officers on the assumption that no suit lay in tort against the government’.<sup>241</sup>

5.132 As discussed above, the landmark decision of the New South Wales Supreme Court in *Bowman v Farnell*, confirmed that the Crown was substantively and procedurally liable to be sued as if it were a subject, and that this included tortious liability. Following federation, the Commonwealth Parliament expressly included tortious claims in s 56 JA, and the High Court in *Baume v Commonwealth* subsequently confirmed that s 56 conferred a right to proceed with such claims.<sup>242</sup>

5.133 The Commonwealth’s liability in tort generally has not been in issue since this decision. However, three discrete areas of crown immunity remain. Firstly, as discussed in detail below, the liability of the Crown in tort was construed as being vicarious rather than direct. Accordingly, there was often a possibility of causation being severed in tortious claims. Secondly, there may be no remedy for loss or damage resulting from wrongful administrative action by the Crown. Thirdly, Parliament may legislate to limit the liability of the Crown, subject to s 51(xxxi) of the Constitution.

### *Vicarious and direct liability*

5.134 Vicarious liability relies upon what was historically a ‘master and servant’ relationship, but now usually arises between employer and employee. Such relationship requires the transfer of liability from the individual committing the tort to the employer in control of that individual — in this case, the Crown. Vicarious

<sup>238</sup> *Claims Against the Government Act 1866* (Qld) 29 Vic No 23, s 2

<sup>239</sup> *Claims Against the Colonial Government Act 1876* (NSW) s 2.

<sup>240</sup> P Finn *Law and government in colonial Australia* OUP Melbourne 1987, 146.

<sup>241</sup> ‘This restrictive reading of Crown liability may derive from the rules made under the New South Wales Act, which suggested it was intended merely as a local variant to the petition of right procedure, rather than creative of substantive rights’: P Finn *Law and government in colonial Australia* OUP Melbourne 1987, 145; *Blakeney v Pegus* (1885) 6 NSWLR (L) 223, 226.

<sup>242</sup> (1886) 7 NSWLR (L) 1; *Baume v Commonwealth* (1906) 4 CLR 97. It is also worth noting that s 2(1) of the *Crown Proceedings Act 1947* (UK) and s 6(1) of the *Crown Proceedings Act 1950* (NZ) both state that ‘the Crown shall be subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject’.

liability is usually imputed from employee to employer, rather than characterised as if the tort were committed by the employer itself.<sup>243</sup> That is, the employer's liability is strict, arising from a relationship of employment, due to risks generated in the course of conducting the employer's business.<sup>244</sup> Consequently there is need to prove fault on the part of the employer.<sup>245</sup>

5.135 Traditionally, the relationship has been characterised by the existence of control, which is relevant not only in its exercise but in the right of the employer to exercise it. Control is not the only factor indicative of such relationship '[r]ather it is the totality of the relationship between the parties which must be considered'.<sup>246</sup> Additional factors include whether personal liabilities arise between them, whether the employer is under a common law duty of care, and whether the employee is part of the employer's organisation.<sup>247</sup> The latter has been described as paramount, as of all considerations, 'the most powerful is the notion that the master should bear the risks that are generated by the conduct of the master's business'.<sup>248</sup>

5.136 Direct liability of an employer assumes fault on the part of the employer. It may arise because the employer orders the employee to commit a tort, or because the master has failed to provide competent employees or a safe place and system of work. In the latter case, the tort arises from a breach of duty owed by the employer to the employee.<sup>249</sup> Direct liability of the Commonwealth assumes that, organisational, administrative or structural inadequacies of the Commonwealth are the underlying causes of a breach of duty by a government agent or employee.

5.137 As discussed below in paragraphs 5.145–5.152, direct liability is often characterised as arising from a 'non-delegable duty'. As a result, the distinction between vicarious liability and direct liability may be difficult to discern in many cases. For example, in the recent case of *Scott v Davis*,<sup>250</sup> the owner of a light aeroplane was held by a majority of the High Court (McHugh J dissenting) not to owe a non-delegable duty of care to a person killed when the plane was flown by a third party. Though the case did not involve the Crown, the reasoning of the court centred on the non-delegable duty of a principal for torts committed by an agent, as an aspect of vicarious liability in motor vehicle accidents.

243 Traditionally the 'master's tort': S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 319.

244 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 86.

245 S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 319.

246 *Stevens v Brodribb Sawmilling Company Proprietary Limited*; *Gray v Brodribb Sawmilling Company Proprietary Limited* (1986) 160 CLR 16, 29 (Mason J).

247 *id.*, 29–31 (Mason J).

248 P Atiyah *Vicarious liability in the law of torts* Butterworths London 1967 cited in P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 86–87.

249 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 87. See also P Atiyah *Vicarious liability in the law of torts* Butterworths London 1967, ch 2; J Fleming *The law of torts* 9<sup>th</sup> ed LBC Information Services North Ryde 1998, ch 19, 22, 24.

250 (2000) 175 ALR 217.



5.138 Only three justices in this case adverted to the question whether the principal and agent relationship amounted to one of vicarious or direct liability. Gummow and Hayne JJ identified that express authorisation or direction from a principal as to the performance of the act was an element indicating direct liability, but this was not the sole indicia.<sup>251</sup> The lack of certainty in the law in this area was expressed by Gleeson CJ.

While I agree that the liability of an employer for the wrongful acts of the employee has evolved in the last 150 years to a vicarious liability, it does not necessarily follow that the liability of a principal for the wrongful acts of an agent who is not a servant is vicarious. *Perhaps it should rather be seen as a direct liability of the principal.*<sup>252</sup>

### *Vicarious liability and the Enever principle*

5.139 In accordance with the erosion of crown immunity, vicarious liability has long been imputed to governments according to the same principles that apply to private employment.<sup>253</sup> However, an exception to this rule, and an area of immunity applied by the courts with ‘undue zeal’,<sup>254</sup> was created by the High Court in *Enever v The King*.<sup>255</sup> In that case, a policeman acting under statutory authority admitted to making a wrongful arrest in the intended exercise of such authority. It was held that the government was not vicariously liable as there was an absence of control by the government, or a master-servant relationship, where a public officer exercised statutory duty.<sup>256</sup> O’Connor J held that

[h]e made the arrest in the discharge of his duty as a holder of the office of constable, and not by the direction or under the control of the government. His act was thus not of the Government by its servant, but was his own act, done in the exercise of his duty as constable, and in the doing of it the relation of master and servant between him and the government cannot be implied.<sup>257</sup>

5.140 A police officer was thus seen as performing his or her duties out of an allegiance to the Crown, rather than ‘on behalf of the government’<sup>258</sup> or as a ministerial officer.<sup>259</sup> Following *Enever*, it was held that where persons were acting

251 id, 258, 270, 272 (Gummow J); 297 (Hayne J);

252 id, 242 (emphasis added).

253 For example *Groves v Commonwealth* (1982) 150 CLR 113; *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358; *Theodore v Duncan* [1919] AC 696. The only limitation was in cases where application of such principles would prevent public officers from discharging their duty, such as liability for injury to a prisoner, see *Gibson v Young* (1900) 21 NSWLR 7.

254 J Fleming *The law of torts* 9<sup>th</sup> ed LBC Information Services North Ryde 1998, ch 19, 418, citing Fullagar J in *Attorney-General v Perpetual Trustee* (1952) CLR 237, 284.

255 *Enever v The King* (1906) 3 CLR 969, 982–994.

256 *ibid*. Consequently, the only cause of action lay against the police officer himself. See also *Thompson v Williams* (1915) 32 WN (NSW) 27.

257 *Enever v The King* (1906) 3 CLR 969, 994.

258 *Delacauw v Fosbery* (1896) 13 WN (NSW) 49, 51 cited in S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 301.

259 *Baume v Commonwealth* (1906) 4 CLR 97.

under ‘original authority’,<sup>260</sup> with ‘absolute duty’ and with ‘independent discretion’, such acts were not imputable to the Crown in accordance with the usual principles of vicarious liability.<sup>261</sup> The *Enever* principle has been used to immunise the Crown in cases regarding a legal aid officer,<sup>262</sup> a court security officer,<sup>263</sup> a tax commissioner,<sup>264</sup> ships’ pilots<sup>265</sup> and, in some circumstances, customs officers.<sup>266</sup>

5.141 The *Enever* principle has been criticised as outdated and unjustifiable from a public policy perspective. Fleming opposed it on the basis that vicarious liability in respect of public functions ‘may serve the cause of deterrence and could often offer the only means of redress because of the difficulty of identifying the individual culprit’.<sup>267</sup> The principle has been described as based on ‘dubious reasoning...not distinguish[ing] between situations in which the creation of an independent discretion arises purely by chance, and those in which it is deliberate’.<sup>268</sup>

5.142 Despite criticism of the *Enever* principle, it was confirmed recently by the Federal Court in *Cubillo v Commonwealth*,<sup>269</sup> and it has been abrogated by statute only in New South Wales.<sup>270</sup> The *Law Reform (Vicarious Liability) Act 1983* (NSW)<sup>271</sup> does not determine vicarious liability by reference to different types or sources of Crown authority. In all cases, vicarious liability depends upon whether the function in question is in the course of serving the Crown and incidental to a Crown activity.<sup>272</sup> In other words, vicarious liability is to be imputed equally to servants directly employed by the Crown and those acting under independent statutory authority.

260 *Oriental Foods (Wholesalers) Co Pty Ltd v Commonwealth* (1983) 50 ALR 452.

261 *Baume v Commonwealth* (1906) 4 CLR 97.

262 *Field v Nott* (1939) 62 CLR 660.

263 *Skuse v Commonwealth* (1985) 62 ALR 108.

264 *Carpenter’s Investment v Commonwealth* (1952) 69 WN (NSW) 175.

265 *Bannockburn v Williams* (1912) 12 SR (NSW) 665; *Fowles v Eastern Australian Steamship Co Ltd* [1916] 2 AC 556; *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

266 The actions of Customs officers have been found to be a source of the Commonwealth’s vicarious liability on the ground that the officers are exercising ministerial duty, as well as being independently and personally liable when acting outside such duty: *Baume v Commonwealth* (1906) 4 CLR 97; *Zachariassen v Commonwealth* (1917) 24 CLR 166.

267 J Fleming *The law of torts* 9<sup>th</sup> ed LBC Information Services North Ryde 1998, ch 19, 419. Similarly, if direct liability were applied, and the Crown itself held to be at fault for breach of duty, such liability may be found regardless of whether there is an identifiable individual committing the tort.

268 S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 305.

269 (2000) 174 ALR 97, 437–449 (O’Loughlin J). In *South Australia v Kubicki* (1987) 46 SASR 282, 287 Jacobs J held that the independent discretion defence was not applicable to an unlawful imprisonment by a police officer. This was because the facts did not satisfy s 19(2) of the *Crown Proceedings Act 1972* (SA), which provided that the defence applied only if it would do so in proceedings between subject and subject.

270 In *South Australia*, s 10(2) of the *Crown Proceedings Act 1972* (SA), but not the 1992 Act, expressly abolished the ‘independent discretion’ function. In Victoria, a number of attempts to legislate against the *Enever* principle have failed. See for example, the position paper of the Victorian Attorney-General’s Department, *Aspects of Crown liability in Victoria* Melbourne 1986. See also S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 306.

271 *Law Reform (Vicarious Liability) Act 1983* (NSW) s 5(1).

272 *id.*, s 7 & 8 respectively. See *Holly v Director of Public Works* (1988) 14 NSWLR 140, 146 (Mahony J).

5.143 In other states and federally, the *Enever* principle remains intact, albeit with a significant exception in the case of police officers. In New South Wales police officers, who are deemed to be ‘persons in the service of the Crown,’ are subject to the ordinary principles of vicarious liability. In other jurisdictions, but not all, the vicarious liability of police officers is dealt with in separate legislation which expressly abrogates the *Enever* principle in favour of blanket vicarious liability for acts in the course of duty ‘in like manner as an employer is liable for tort committed by the employer’s servant in the course of employment’.<sup>273</sup>

5.144 This is also true at the federal level, with the vicarious liability of the Australian Federal Police dealt with separately in s 64B(1) of the *Australian Federal Police Act 1979* (Cth), which states,

The Commonwealth is liable in respect of a tort committed by a member in the performance or purported performance of his or her duties as such a member in like manner as a person is liable in respect of a tort committed by his or her employee in the course of his or her employment, and shall, in respect of such a tort, be treated for all purposes as a joint tortfeasor with the member.

**Question 5.25.** Should the principle from *Enever v The King* (1906) 3 CLR 969, that the Crown is not vicariously liable for torts of Crown employees or agents who act with ‘independent discretion,’ be abrogated?

**Question 5.26.** Should legislation similar to the *Law Reform (Vicarious Liability) Act 1983* (NSW) be enacted by the Commonwealth Parliament to abrogate the principle in *Enever v The King* (1906) 3 CLR 969 in respect of employees of the Crown in the right of the Commonwealth? Alternatively, should a provision such as s 64B of the *Australian Federal Police Act 1979* (Cth), which presently abrogates the principle for police officers, be extended to all agents and employees of the Crown in the right of the Commonwealth?

273 *Police Act 1937* (Qld) s 69B; *Police Administration Act 1979* (NT) s 163. Note also *Police Act 1964* (UK) and *Crown Procedures Act 1959* (NZ). In Western Australia and Victoria, the issue remains one governed by common law. See S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 312. In South Australia and Tasmania, legislation provides that the Crown is directly liable for the torts of police officers. In Western Australia and Victoria, the issue is a matter of common law: see S Churches ‘The trouble with Humphrey in Western Australia: Icons of the Crown or impediments to the public’ (1990) 20 WALR 688, 701.

***Direct liability and non-delegable duty***

5.145 Unlike many overseas jurisdictions, direct liability of the Crown in Australia<sup>274</sup> has developed as a matter of common law. In *Farnell v Bowman*,<sup>275</sup> a claim in trespass to land and negligence of a local government employee, the Privy Council held that the government was liable, 'by their servant'<sup>276</sup> for damage caused by the escape of fire. This decision became the basis of a clear recognition of the government's direct liability. Although not clearly stated, there was no identifiable individual from which to impute vicarious liability and no mention of vicarious liability or its principles by the Court. The decision in *Farnell v Bowman* was subsequently applied to find the colonial governments directly liable as bailees,<sup>277</sup> and liable for the escape of bullets fired from a military practice range.<sup>278</sup>

5.146 In most Australian jurisdictions, no specific reference is made to direct liability of the Crown in crown proceedings legislation.<sup>279</sup> The courts have applied general principles of tortious liability, together with the principle that the Crown cannot claim immunity from being sued in respect of such liability.<sup>280</sup> In many overseas jurisdictions, however, the liability of the Crown must fall into categories defined by statute. In the United Kingdom and New Zealand, and in all but two Canadian provinces<sup>281</sup> legislation provides that the Crown is directly liable for breaches of its duties as an employer, as an occupier of land and pursuant to statute.<sup>282</sup> While these three heads of direct liability are certainly the most important, they are not exhaustive,<sup>283</sup> and there are areas of damage covered by the Australian common law approach, that are not covered by legislation in these jurisdictions. Prominent examples are the liability of a school authority for accidents caused by pupils, liability of hospitals for death caused by the lack of a proper system of drug administration, and liability of a prison for injuries caused to prisoners by other prisoners.<sup>284</sup> If the Crown were the defendant in these overseas jurisdictions, it would be found free from liability.

274 Also in British Columbia and Quebec.

275 *Farnell v Bowman* (1887) 12 App Cas 643, 648.

276 id, 644.

277 *Brabant & Co v King* [1895] AC 632; *Welden v Smith* [1924] AC 485, though note this is arguably a contractual matter: S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 301; P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 7.

278 *Evans v Finn* (1904) 4 SR (NSW) 297.

279 Except for Victoria.

280 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 102.

281 British Columbia and Quebec.

282 *Crown Proceedings Act* 1947 (UK) s 2(1); *Crown Proceedings Act* 1950 (NZ) s 6(1) and for example, in *Ontario Proceedings Against the Crown Act* RSO 1980 c 393 s 5. See also P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989 ch 5, fn 29.

283 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 102.

284 id, 103.

5.147 In Australia, the broad language of the state crown proceedings legislation and the relevant provisions of the *Judiciary Act*, and the lack of a statutory framework for direct liability, mean that the distinction between direct and vicarious liability is in many cases insignificant to the outcome in a case, and vicarious and direct liability can overlap. For example, in the case of injuries to prisoners resulting from inadequate supervision, prison authorities have been found both vicariously liable in respect of the act of the supervising officer and directly liable at a planning/operational level.<sup>285</sup> This is not so in the United Kingdom, where neither vicarious nor direct liability may be found in such cases.<sup>286</sup>

5.148 Australian judicial policy has been that direct liability of the Crown should be implied in the majority of those circumstances not caught by vicarious liability. Increasingly, direct liability derives from the concept of non-delegable duty — a duty too ‘personal’<sup>287</sup> in nature to be avoided by delegation. This duty replaces, and is ‘higher’ and ‘more stringent’ than, the usual common law duty to take reasonable care. Rather, it is a duty to ensure that reasonable care is taken, and ‘a special duty on persons in certain situations to take particular precautions for the safety of others’.<sup>288</sup>

5.149 The ‘leading example’ of the direct liability approach arose in the context of employment in the decision of the House of Lords in *Wilsons & Clyde Coal Co v English* where

the...duty was personal to the employer, in this sense that he was bound to perform it by himself or by his servants ...The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfillment to employees, even though selected with due care and skill ... Such a duty is the employer’s personal duty, whether he performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer’s personal negligence.<sup>289</sup>

5.150 Non-delegable duties can be owed by school authorities, employers, prison authorities, hospitals and landlords in certain circumstances, and direct rather than vicarious liability consequently owed by the Crown.<sup>290</sup> Such circumstances might

285 *L v Commonwealth* (1976) 10 ALR 269, 276 (Ward J).

286 For example, in *Keatings v Secretary of State for Scotland* [1961] SLR 63 a prisoner injuring another prisoner was not a ‘servant or agent’, there was no employment relationship, no statutory duty beyond the provision of a safe system of work and safe equipment, and no occupiers liability as the injury occurred on a painting scaffold not attached to the property. See P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 103.

287 *Kondis v State Transit Authority* (1984) 154 CLR 672, 687 (Mason J). See also *Commonwealth v Introvigne* (1980) 150 CLR 258.

288 *Commonwealth v Introvigne* (1980) 150 CLR 258, 271 (Gibbs J); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 32 (Mason J).

289 (1938) AC 57, 78–82 cited by Mason J in *Kondis v State Transit Authority* (1984) 154 CLR 672.

290 *Commonwealth v Introvigne* (1980) 150 CLR 258; *Kondis v State Transit Authority* (1984) 154 CLR 672; *Cassidy v Ministry of Health* [1951] KB 343; *Burnie Port Authority v General Jones Pty Ltd* (1994)

include injury caused to Crown employees due to asbestos inhalation,<sup>291</sup> injury caused to children while in a school playground, or generally, where the Crown has assumed responsibility for the safety of the injured person in circumstances where that person might reasonably have expected due care to have been exercised by the Crown.<sup>292</sup>

5.151 In *Ramsey v Larsen*<sup>293</sup> the High Court found that a school teacher who negligently injured a pupil was performing his tasks under statute as a civil servant of the Crown in the right of NSW. Previously, teachers had been held to act on their own account by delegation from the parents.<sup>294</sup> The *New South Wales Law Reform Commission* identified this case as a change in judicial attitudes regarding claims against the government.<sup>295</sup> This and subsequent cases found a common law duty of care owed by teacher to pupil, and vicarious liability of the government for torts due to the negligence of teachers, and vicarious liability of school authorities for torts committed by students who are not properly supervised.<sup>296</sup>

5.152 In *Commonwealth v Introvigne*, however, the Commonwealth was held to owe a direct and non-delegable duty to children attending schools in the ACT.<sup>297</sup> This duty was found to be similar to the non-delegable duty owed by hospital authorities to patients for the negligence of their doctors.<sup>298</sup> Other cases have recognized that Crown liability through school authorities can be either vicarious, where a teacher has acted negligently, or direct as a breach of a non-delegable duty.<sup>299</sup> Common among cases of non-delegable duty are the element of control on the part of the Crown and the element of special dependence or vulnerability on the part of the injured party.<sup>300</sup>

**Question 5.27.** Should the distinction between direct and vicarious liability be relevant to the Commonwealth's liability for torts?

179 CLR 520; *Harris v Northern Sandblasting Pty Ltd* (1995) Aust Torts R 81–365; *L v Commonwealth* (1976) 10 ALR 269.

291 *Western Australia v Watson* [1990] WAR 248.

292 *Kondis v State Transit Authority* (1984) 154 CLR 672, 687 (Mason J).

293 (1964) 111 CLR 16.

294 As was previously held in *Hole v Williams* (1910) 10 SR (NSW) 638.

295 New South Wales Law Reform Commission *Proceedings by and against the Crown* Report 24 NSWLRC Sydney 1976, 18.

296 *Geyer v Downs* (1977) 17 ALR 408, see also S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde 1998, 327.

297 Vicarious liability could not be found, as by arrangement with the New South Wales Government, the schools were administered and teachers were hired and controlled by the latter: *Commonwealth v Introvigne* (1980) 150 CLR 258.

298 *Commonwealth v Introvigne* (1980) 150 CLR 258, 266 citing *Cassidy v Ministry of Health* [1951] KB 343.

299 *Watson v Haines* (1987) Aust Torts R 80–094. See also *Horne v Queensland* (1995) Aust Torts R 81–343.

300 See *Commonwealth v Introvigne* (1980) 32 ALR 251, 271; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 521.

**Question 5.28.** What provision, if any, should be made in the *Judiciary Act* or other legislation in respect of the Commonwealth's direct and vicarious liability for torts?

**Question 5.29.** Should the Commonwealth be directly, rather than vicariously, liable for torts committed by its employees and agents?

### *Comparative reform*

5.153 The Ontario Law Reform Commission's *Report on the liability of the Crown*<sup>301</sup> noted that, while statutory reforms had abolished most of the immunities historically enjoyed by the Crown in tort, the legislation left a number of residual immunities that continued to protect the Crown from being sued as if it were an ordinary person.<sup>302</sup> The OLRC's recommendations aimed to place the Crown in the same position under the law as any other person, through the adaptation and incorporation of tort principles in ways appropriate to public sector activity by the Crown, rather than the enactment by statute of a codified 'public' tort law.<sup>303</sup> Accordingly the OLRC recommended that all statutory immunity clauses regarding torts by Crown servants be repealed and such torts indemnified by the Crown. The OLRC also recommended and drafted an *Act To Reform Crown Privileges In Respect Of Civil Liabilities And Proceedings*,<sup>304</sup> which included a provision that

2(1) Except as specifically provided by this Act or any other statute, the privileges of the Crown in respect of civil liabilities and civil proceedings are abolished and the Crown and its servants and agents are subject to all the civil liabilities and rules of procedure that are applicable to other persons of full age and capacity.

5.154 In Australia and overseas, the issue of vicarious and direct liability has also, been examined from time to time by law reform agencies. Within the context of individual liability under private tort law, and the difficulty of establishing the identity of the employee who had committed the tort, the Canadian Law Reform Commission suggested the need for direct liability by the Crown or government.<sup>305</sup> In conjunction with its abovementioned general provision, the Ontario Law Reform Commission recommended that the heads of direct liability pursuant to statute be abolished, to ensure that the Crown may be held liable for torts that are not covered by such statutes.<sup>306</sup> This was supported in 1987 by the Law Reform Committee of

301 Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989.

302 id, 14.

303 id, 24–25.

304 id, App 1.

305 Law Reform Commission of Canada *The legal status of the federal administration* Working Paper 40 LRC Ottawa 1985, 70–71.

306 Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 25.

South Australia, which called for the recognition of the vicarious liability of the Crown. Such liability should, in effect, be directly imposed by individual statutes, and Crown servants given immunity,<sup>307</sup> as this 'is just and sensible and should be universally adopted'.<sup>308</sup> The blurred distinction in Australia between direct and vicarious liability is evident in this recommendation.

**Question 5.30.** Should the *Judiciary Act* be amended to include a provision such as that recommended by the Ontario Law Reform Commission in s 2(1) of its draft *Act To Reform Crown Privileges In Respect Of Civil Liabilities And Proceedings*? Would this be an adequate and appropriate guarantee of Crown liability in tort, including torts for which vicarious or direct liability may not presently exist?

### *Administrative negligence*

5.155 Remedies for loss caused by administrative or 'public' law error have traditionally been limited to judicial review of administrative decisions. This follows the Dicean principle that 'no man is punishable...except for a direct breach of law established in ordinary legal manner before the ordinary courts of the land'.<sup>309</sup> Consequently, where a person had suffered a loss as a consequence of public law error, a remedy in damages was available only if a private law action was also or otherwise available.<sup>310</sup>

5.156 Because establishing an administrative illegality does not necessarily require fault, this rule is seen as protecting government officers from a more onerous liability than that to which the general public is subject.<sup>311</sup> The rule has been criticised, however, due to the rapid increase in the last 20 years in the exercise of administrative power, 'and the consequential and increasing frequency with which irrecoverable losses are suffered by individuals or corporate organizations following the wrongful exercise of administrative power'.<sup>312</sup>

307 Law Reform Committee of South Australia *Proceedings by and against the Crown* Report 104 LRCSA Adelaide 1987.

308 id, 31.

309 See AV Dicey *Introduction to the study of the law of the Constitution* 8<sup>th</sup> ed London 1915, 183 cited in G McCarthy 'Mengel: A limited remedy in damages for wrongful administrative action' (1996) 4 *Australian Journal of Administrative Law* 5, 5.

310 See eg *Dunlop v Woollahra Municipal Council* [1982] AC 158; *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700.

311 See P Craig 'Negligence in the exercise of statutory power' (1978) *LQR* 428.

312 G McCarthy 'Mengel: A limited remedy in damages for wrongful administrative action' (1996) 4 *Australian Journal of Administrative Law* 5, 7.



5.157 It is important to note that the rule against remedy for administrative tort raises separate and distinct questions of Crown liability, as it does not conflict directly with the notion that the Crown should be treated in the same way as a private citizen. In this case, the issue is whether a new substantive ground of Crown liability should be created in respect of things that private citizens do not do, because of the inherent difference in functions. Consequently, s 64 JA, which refers to rights 'between subject and subject' in claims against the Commonwealth cannot be applied to administrative wrongs.

5.158 However, it is important to consider the law with respect to administrative wrong in the context of crown immunity, for two reasons. First, this immunity is more powerful in protecting the government in the modern environment, where the administrative action of government reaches more and more into the lives of ordinary citizens. Second, an argument in favour of the presumption of crown immunity generally, namely that the Crown is inherently different from ordinary citizens in its activities, is epitomized in the case of administrative actions. If remedies are recognised for administrative wrong, then this opposes the notion that the uniqueness of government is sufficient ground for maintaining the presumption of crown immunity.

5.159 Crown immunity from private law remedies is not generally in issue in Australia. However, in the case of the administrative errors of government, principles of public law may limit the availability of private law remedies. The resulting immunity afforded to government in such cases may fall into one of three categories.<sup>313</sup>

5.160 First, where a private law duty of care conflicts with a public law statutory duty, the public interest prevents a plaintiff from claiming damages. An example was the slaughter of pastoralists' cattle to eradicate bovine brucellosis and tuberculosis in the Northern Territory.<sup>314</sup>

5.161 Second, public law errors often occur in situations that could not occur under private law and thus no private law action or remedy is available. An example was a wrongful council building restriction which was later declared to be void, but for which no remedies were available to recover consequential loss of market value, loan interest, architects fees, rates and taxes.<sup>315</sup> Remedies in such cases are limited to ex gratia payments,<sup>316</sup> or to whatever remedy is available under the statute that has been breached.

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313 id, 10–12. See also 'Liability looms as a crucial issue' (1995) 11(8) *Company Director Legal Reporter* 5.

314 *ibid.*

315 *Dunlop v Woollahra Municipal Council* [1982] AC 158.

316 Such as are provided for under the *Ombudsman Act 1976* (Cth) s 15(2)(b) and the *Audit Act 1901* (Cth) s 34A.

5.162 Third, many wrongful administrative decisions or actions may be rectified or reversed without apparent or significant loss or damage. Examples include wrongful dismissals, wrongfully cancelled licences, and judicial decisions made in error of law. In some such cases, the decision can be remade with regard to the finding of error to achieve the same end result while removing the plaintiff's cause of action.

5.163 Until the case of *Northern Territory v Mengel*,<sup>317</sup> rectification of this deficiency in public law remedies had not been considered by the courts.<sup>318</sup> In this case the plaintiffs sought to recover damages for stock loss resulting from an unlawful direction by a Northern Territory Government stock inspection. The plaintiffs were unsuccessful in dual 'misfeasance in public office' and 'action on the case' claims.<sup>319</sup> However, the High Court suggested that the plaintiffs could be successful in seeking damages by 'reformulating'<sup>320</sup> their case as an action in negligence. The majority of the Court held that

[g]overnments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, thus, there may be circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power. And if the circumstances give rise to a duty of care of that kind, they will usually also give rise to a duty on the part of the officer or employee concerned to ascertain the limits of his or her power.<sup>321</sup>

5.164 In a separate but concurrent judgment, Deane J described this action as 'founded on the proposition that [the inspectors] were in breach of a duty of care owed to Mr Mengel in failing to appreciate that their actions were unauthorised'.<sup>322</sup>

5.165 The judgment in *Mengel* makes damages arising from a public law wrong available where previously they were not. The Court's suggested cause of action treads a fine line between a claim for damages in negligence against the Commonwealth, which is permissible, and a claim for damages for a public wrong, which is not. The Court appears to suggest that liability might be attached to the government where a public wrong occurs, so long as it can also be viewed as a negligent act or omission.

317 (1995) 129 ALR 1.

318 Other than expressions of dissatisfaction: eg *Macksville and District Hospital v Mayze* (1987) 10 NSWLR 708, 725; *F Hoffman-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, 358.

319 This claim, pursuant to the *Beauresert* principle of 'action on the case', is for loss as an inevitable consequence of the unlawful, intentional and positive acts of another: *Beauresert Shire Council v Smith* (1966) 120 CLR 145.

320 *Northern Territory of Australia and others v Arthur John Mengel* (1995) 129 ALR 1, 39 (Deane J).

321 id, 23 (Mason CJ, Dawson, Toohey, Gaudron, McHugh JJ).

322 id, 39 (Deane J).

5.166 Whether such actions will be successful in practice, will depend upon how onerous it is for the plaintiff to make out all the elements of negligence in such cases — duty of care, breach of duty, causation, foreseeability and damage. Arguably, there are very few circumstances in which this may occur.<sup>323</sup> It is unclear whether the decision in *Mengel* represents a major shift in judicial policy, of which the legislature ought to take heed, or simply responds to the unusual circumstances of the case at hand.<sup>324</sup>

5.167 The difficulty faced by a plaintiff who seeks to establish liability for an alleged public wrong arises from the fact that the law of negligence and the law regarding breach of statutory duty have developed in a different way and by reference to different considerations of reasonableness. In *Crimmins v Stevedoring Industry Finance Committee*,<sup>325</sup> McHugh J concluded that the duty of care of a public authority is a question of what a 'reasonable authority' would have done, rather than what a 'reasonable person' would have done. A breach of duty on the part of a public authority does not automatically follow from a failure to exercise a function or power. Breach depends upon all the circumstances, including the terms of the function or power and the competing demands on the authority's resources.<sup>326</sup> As McHugh J put it

[p]ublic law concepts of duty and private law notions of duty are informed by differing rationales...the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires.<sup>327</sup>

5.168 Law reform bodies in New Zealand and the United Kingdom have recommended legislative changes to empower courts to award damages for public law error, but these have not been taken up by parliament.<sup>328</sup> As discussed above, the Law Reform Commission of Canada recommended compensation schemes be established to compensate victims of administrative error.<sup>329</sup> Such remedies are available in many European countries.<sup>330</sup>

323 G McCarthy 'Mengel: A limited remedy in damages for wrongful administrative action' (1996) 4 *Australian Journal of Administrative Law* 5.

324 See 'Liability looms as a crucial issue' (1995) 11(8) *Company Director Legal Reporter* 5. (1999) 167 ALR 1, 24.

325 See also *Pyrenees Shire Council v Day* (1988) 192 CLR 330, 317 (McHugh J); 394–5 (Gummow J). (1999) 167 ALR 1, 21.

326 New Zealand Public and Administrative Law Reform Committee *Damages in Administrative Law* 14<sup>th</sup> Report Wellington May 1980; Report of the Committee of Justice — All Souls Review of Administrative Law in the United Kingdom *Administrative Justice: Some necessary reforms* Clarendon Press Oxford 1988, cited in G McCarthy 'Mengel: A limited remedy in damages for wrongful administrative action' (1996) 4 *Australian Journal of Administrative Law* 5, 7.

327 Law Reform Commission of Canada *The legal status of the federal administration* Working Paper 40 LRC Ottawa 1985, 74.

328 G McCarthy 'Mengel: A limited remedy in damages for wrongful administrative action' (1996) 4 *Australian Journal of Administrative Law* 5, 7.

**Question 5.31.** To what extent has the decision in *Northern Territory of Australia v Mengel* (1995) 129 ALR 1 exposed the Commonwealth to suits in respect of wrongful administrative action?

**Question 5.32.** Should the Commonwealth Parliament legislate to empower the courts to award damages for loss resulting from wrongful administrative action?

***Other public sector torts — inaction or ineffective action***

5.169 It should finally be noted that, apart from torts by the Crown which resemble those committed by ordinary citizens, and apart from those unique torts arising from administrative error, there are a wide range of possible torts that are indirectly caused by government. These are torts for which government might be considered liable in the sense that they are caused by tortfeasors — employers, manufacturers or careless drivers — who are regulated in some form by government, and whose torts the government may have been in a position to prevent. McMillan describes such torts as follows.

Each year in Australia many people suffer injury which government is in a position to prevent. Illness arising from contaminated foodstuffs and polluted waterways could be averted by more rigorous health inspection. Road accidents could be lessened by improved roads and signage. Workplace injuries could be prevented by stricter enforcement of occupational safety codes. Prisoners in detention could be better protected against assaults from other inmates. Children in schoolyards could be insulated from peer aggression and hazardous apparatus. Assaults and robberies could be deterred by increased law enforcement and better public lighting. Visitors to national parks could be thwarted from undertaking perilous recreational activities.<sup>331</sup>

5.170 Indeed, recent cases such as *Cubillo v Commonwealth*,<sup>332</sup> in which claims for compensation from government have been made by ‘Stolen Generation’ children, are symptomatic of a changing view of the liability of government for injury, loss and damage which it contributes to by way of inaction or ineffective action. Plaintiffs in such cases are hindered by problems of causation rather than governmental immunities. However, the policies which demand greater liability of government in such cases relate closely to those which militate against governmental immunities generally. It remains to be seen whether the law will develop to expand notions of causation to include instances where government has failed ‘to discharge what some will claim to be its moral opportunity or its legal responsibility to take preventative action to prevent those at risk’.<sup>333</sup>

331 J McMillan ‘Public sector tort liability and its intersection with administrative law’ *Paper Annual public law weekend Canberra 10 & 11 November 2000*, 3.

332 [2000] FCA 1084.

333 J McMillan ‘Public sector tort liability and its intersection with administrative law’ *Paper Annual public law weekend 10 & 11 November 2000*, 3.

## Immunity from statute — presumption and rebuttal

### Introduction

5.171 The immunity of the Crown from statute remains a common law presumption in all Australian and many overseas jurisdictions. Consequently, a statute is binding on the Crown only if the terms of such statute, or of a generally applicable crown proceedings statute such as the *Judiciary Act*, can be construed as rebutting the presumption of immunity. In the simplest scenario — the ‘intra polity situation’ — an applicant seeks to enforce a statute against the Crown of the enacting legislature; for example, by suing the *New South Wales Government* pursuant to the *Residential Tenancies Act 1987* (NSW). A more complicated scenario — the ‘inter polity situation’ — occurs where an applicant seeks to enforce a statute against a capacity of the Crown which did not participate in enactment of the statute; for example, by suing the Commonwealth or, say, the State of Western Australia, pursuant to the *Residential Tenancies Act 1987* (NSW). These different scenarios are explained in detail below.

5.172 A general rule of construction for many years held that the presumption of crown immunity from statute is rebutted only by express words or necessary implication from the terms of the statute. In respect of the intra polity situation, the High Court in *Bropho*<sup>334</sup> reformed this rule to include consideration of the purpose and subject matter of the statute. In respect of the inter polity situation, the High court in *Bradken*<sup>335</sup> had previously decided that the general rule of construction applied to the Crown in all capacities, not just that of the enacting legislature. In other words, while *Bradken* had expanded the presumption of immunity in terms of the breadth of its application, *Bropho* then eroded the presumption in terms of the ease with which it may be rebutted.

5.173 The High Court has consistently applied *Bradken* and *Bropho* to both the intra and inter polity situations. However, the application of *Bropho* in the inter polity situation remains controversial. There exist well established policy arguments for and against extension of the presumption of crown immunity and the general rule of construction beyond the enacting polity, just as there are arguments for and against the softening of this rule. The tenets of federalism, the indivisibility of the Crown, the principles of equality, theories of modern government, historical legal analyses, pragmatic notions of simplicity, and legislative activism, all impact on this debate.

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334 (1990) 171 CLR 1, 21–22 (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ).

335 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

5.174 For these reasons, the law remains uncertain in many respects, and whether the Commonwealth is bound by a statute in a particular case may be difficult to predict. Section 64 JA plays a limited role in determining this issue, picking up substantive statutory provisions to some degree where the Crown is a defendant in civil proceedings, but the scope of this provision is again unclear and it does not of its own force expose the Commonwealth to the operation of statutes generally. Amendments to this section may assist in clarifying the law in this area.

### **Intra polity immunity — the immunity of the Crown from statutes of its own legislature**

#### *The common law presumption of immunity*

5.175 At common law there is a rule of construction by which a statute is presumed not to apply to the Crown, despite general words that would otherwise include it. Such presumption prevails, therefore, subject to its specific rebuttal by the terms of the statute itself or by other statutes, such as the *Judiciary Act* or a crown proceedings statute, which may, in some cases and to some degree, pick up the primary statute and apply it against the Crown. Like the other prerogative Crown immunities, the immunity from statute has its origins in the English common law. Some early authorities applied the immunity only in protection of the Crown's prerogative rights.<sup>336</sup> However, in the majority of cases the immunity was applied 'whether or not the prerogative was affected and irrespective of the purpose of the statute'.<sup>337</sup> From these historical origins, the Privy Council in *Bombay v Municipal Corporation of Bombay*<sup>338</sup> developed an important principle with respect to rebuttal of the immunity.

5.176 In this case, the Crown in the right of the Province of Bombay held land in respect of which it claimed to be exempt from the City of Bombay Municipal Act. The Act empowered a City official to lay water mains through 'any land whatsoever' in the city, but was silent as to whether it bound the Crown and so applied to the land in question. The Privy Council held that the Act was not binding on the Crown as it did not do so by express words or by 'necessary implication', which is present only if 'manifest from the very terms of the statute', ('the general rule of construction'). This rule, which until recently was applied widely in Commonwealth countries, meant that unless the purpose of the statute

336 Initially, the English courts did not rigorously apply the presumption that the Crown was immune from statute. Immunity was granted to the Crown only in those circumstances where its pre-existing prerogative rights and interests might have been prejudiced by the enforcement of legislative provisions against it: *Willion v Berkely* (1561) 75 ER 339 (KB); see P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 202. See also the *Magdalen College* case (1615) 11 Co Rep 66b, 72a (Lord Coke); D Kinley 'Crown immunity: A lesson from Australia?' (1990) 53 *Modern Law Review* 819, 820; J Wolffe 'Crown immunity from regulatory statutes' [1988] *Public Law* 339–346.

337 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 202.

338 *Bombay v Municipal Corporation of Bombay* [1947] AC 58.

would be ‘wholly frustrated’ if not binding on the Crown, the presumption of crown immunity prevailed.<sup>339</sup> The *Bombay* decision therefore clearly rejected earlier decisions that rights peculiar to the Crown must be affected for immunity to prevail; the land in question having been acquired from private owners without the exercise of any prerogative power.<sup>340</sup>

### ***Rebutting the presumption***

5.177 The presumption of immunity may be rebutted expressly or by implication. In the intra polity situation, the interpretation of a clause expressly binding the Crown to a statute necessarily entails fewer potential complications than does the inter polity situation. For example, whether a clause states generally a *New South Wales* Act ‘binds the Crown’, or states in particular that the Act binds ‘the Crown in the right of the State of NSW’, it is clear that NSW, at least, is bound by the Act. Where the binding effect of a statute must be construed by implication, however, such conclusion is often more difficult to determine.<sup>341</sup>

5.178 English courts have been very reluctant to find the ‘necessary implication’ that would make a statute applicable to the Crown, when express words have not been used. Occasional deviations from a strict application of the general rule of construction were firmly rejected by the House of Lords in *Lord Advocate v Dumbarton District Council*,<sup>342</sup> which firmly reinforced the decision in the *Bombay* case.<sup>343</sup>

5.179 As with the superior courts of other Commonwealth jurisdictions, early High Court cases in Australia adopted the general rule of construction from the *Bombay* case and confined the rebuttal of crown immunity within its strictures. Refinements to the rule were nevertheless made, and the test which was for many years applied was as described by the High Court in *Commonwealth v Rhind*, which held that

in the construction of statutes...the Crown is not included in the operation of a statute unless by express words or by necessary implication. Where the Crown is not expressly mentioned, the implication will be found, if at all, by consideration of the subject matter and of the terms of the particular statute.<sup>344</sup>

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339 L Katz ‘The test for determining the applicability to the states of federal statutes which do not expressly bind them’ (1994) 11 *Australian Bar Review* 222.

340 *Bombay v Municipal Corporation of Bombay* [1947] AC 64. See P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 203.

341 The uncertainty which arises in the inter polity situation from both general and particular express clauses is discussed in detail below in para 5.220–5.225. Where the binding effect of a statute must be construed by implication, however, complications may arise in both the intra and inter polity situations.

342 *Lord Advocate v Dumbarton District Council* [1989] 3 WLR 1346.

343 The decision in *Lord Advocate v Dumbarton* also overruled an exception to Crown immunity, in addition to those set down in the *Bombay* case, established by the Court of Appeal in *Madras Electric Supply Corporation Ltd v Boarland* [1955] AC 667. It was in this case that the Crown could also be bound by a statutory provision whose application would not ‘adversely affect’, the Crown in any way.

344 *Commonwealth v Rhind* (1966) 119 CLR 584, 598.

5.180 Consideration of the subject matter of a statute, though not sufficient alone to bind the Crown in *Rhind's* case, was thus incorporated into the reasoning of the courts in such matters. This signified a departure from the strict interpretation of crown immunity from statute created in the *Bombay* case and developed in the United Kingdom. The High Court in *Bropho* subsequently incorporated the interpretation of subject matter into a revised general rule of construction, which replaced the *Bombay* principle and revolutionised the law regarding crown immunity from statute in Australia. The effect was that the test for determining whether a statute impliedly binds the Crown became significantly easier to satisfy.<sup>345</sup>

5.181 In *Bropho*, the State of Western Australia and the Western Australian Development Corporation proposed to redevelop the Swan Brewery site in Perth. The appellant sought an injunction to restrain any redevelopment on the basis that the site was an Aboriginal site protected under the *Aboriginal Heritage Act 1972* (WA). By s 6, that Act applied 'to all objects...irrespective of where found or situated in the State', and by s 10 the Minister was obliged to record 'all places in Western Australia' of sacred, ritual or ceremonial significance to Aboriginal people. Section 17 made it an offence for any person to alter, damage or destroy any Aboriginal site or any object on such a site. The respondents resisted the injunction on the ground that the provisions of the Act did not bind the Crown in the right of Western Australia.

5.182 In the leading judgment of the High Court, the view was expressed that, in the interests of brevity of legislation and as an aid to statutory construction, it was appropriate that there be a presumption that general words in a statutory provision either do or do not bind the Crown. However, it was held that the 'necessary implication' might be found in the 'subject matter and disclosed purpose and policy' of the Act,<sup>346</sup> and the overall operation of the Act in relation to its subject matter, and no longer necessarily in the manifest terms of the Act itself. The general rule of statutory construction was still to be applied, but 'if, however, a legislative intent that the Crown be bound is apparent notwithstanding that those tests are not satisfied, that legislative intent must prevail'.<sup>347</sup>

5.183 By this reasoning, the Court held that the *Aboriginal Heritage Act 1972* (WA) applied to Crown land and to employees of the Crown. The language of the Act, and in particular sections 6 and 10, demonstrated a legislative intent that the Act apply generally to crown land and to objects on such land. The disclosed policy and purpose of the Act (to preserve, on behalf of the community, places and

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345 L. Katz 'The test for determining the applicability to the states of federal statutes which do not expressly bind them' (1994) 11 *Australian Bar Review* 222.

346 *Bropho v Western Australia* (1990) 171 CLR 1, 21–22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

347 *id.*, 23 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).



objects customarily used by or traditional to the original inhabitants of Australia or their descendants) supported this conclusion. Given that 93% of Western Australian land is Crown land, the Act would be extraordinarily ineffective to preserve Western Australian Aboriginal sites and objects if it applied only to land that is not Crown land. This reasoning is in stark contrast to that which would have applied according to the principle from the *Bombay* case, which required the much stricter test of whether the purpose of the Act would be ‘*wholly frustrated*’. This would clearly not have been the case and a different decision would have transpired.

**Question 5.33.** If the presumption of crown immunity from statute is to remain, is the revised rule of construction in *Bropho v Western Australia* (1990) 171 CLR 1 the appropriate rule for determining whether a statute binds the Crown? If not, is the *Bombay* principle appropriate, or should a different rule apply?

### *The temporal application of Bropho*

5.184 The High Court in *Bropho* was conscious of the significant change they were effecting in the common law. In future, parliaments could take the new presumption into account when deciding whether an Act should be expressed to bind the Crown. But what was to be made of statutes that were enacted in the shadow of the *Bombay* case, and in particular, what was to happen to statutes that had already been the subject of judicial decision?

5.185 In *Bropho*, Brennan J in dissent held that it was a legal fiction to impute to the legislatures of Australia an intention that fluctuates with the Court’s changing formulations of the presumption of crown immunity. His Honour opined that, statutes are ordinarily enacted ‘without conscious animadversion to the strength of the presumption’.<sup>348</sup> The circumstances relevant to determining what intention ought fairly to be imputed to a legislature should thus be the same when interpreting statutes enacted in the future as when interpreting those enacted in the past.

5.186 The majority in *Bropho* held that there is now a graduated scale of presumptions, depending on the date of enactment. Where a statutory provision was enacted before the Privy Council’s 1946 decision in the *Bombay* case, it is safe to apply the ordinary test in *Bropho* because the strict test was not yet in force in Australia at that time. However, when construing legislative provisions enacted between 1946 and 1990, *some* account should be taken of the fact that the more

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348 *Bropho v Western Australia* (1990) 171 CLR 1, 29 (Brennan J).

stringent presumption was seen to be of general application at the time of enactment.<sup>349</sup> Exactly how much account should be taken of the stricter presumption during this period is not clear. Where the applicability to the Crown of a statute enacted between 1946 and 1990 has already been determined by the courts, it seems that the stricter presumption will apply and the decision will not be disturbed.<sup>350</sup> In other cases the position is clouded by the rider in *Bropho* that if a legislative intent that the Crown is to be bound is apparent, that legislative intent must prevail, even if the stringent tests are not satisfied.

5.187 In *Commonwealth v Western Australia*,<sup>351</sup> which was an inter polity case regarding Western Australian legislation and the Commonwealth, Hayne J referred to the opinion in *Bropho* that the intention of a statute may vary over time. His Honour agreed that the intention of the legislature at the time of enactment as to the strength of a statute, may be relevant when determining whether it binds the polity of that legislature. However, His Honour concluded that ‘it may be doubted that difficulties of that kind intrude upon the present question, which is one concerning the intention of a legislature to affect the executive of another polity in the Federation’.<sup>352</sup> It appears, therefore, that Brennan J’s view in *Bropho* may have more support in the inter polity situation.

**Question 5.34.** If the rule in *Bropho* is to be retained, should it apply to all statutory provisions, regardless of when they came into force, or should courts, when construing a statutory provision, take into account the interpretation of the statute and the status of the presumption of crown immunity, as it was at the time of enactment? Should this be clarified by amendment to the *Judiciary Act*?

**Question 5.35.** If relevant in the intra polity situation, should the issue of the changing interpretation of a statute over time also be relevant in the inter polity situation when determining the applicability of the rule from *Bropho*?

### *Reform of the common law — comparative experience*

5.188 Many law reform agencies have adopted the view that it is more appropriate for legislatures to specify when the Crown should be immune from statute than to retain the converse presumption. Commonly, therefore, recommendations have been directed at reversing the immunity. In Australia, the Law Reform Committee

349 *Jacobsen v Rogers* (1995) 182 CLR 572, 586; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 270.

350 *Jellyn Pty Ltd v State Bank of South Australia* (1995) 129 ALR 521, 526–7; *Woodlands v Permanent Trustee Co Ltd* (1996) 139 ALR 127, 136.

351 *Commonwealth v Western Australia* (1999) 196 CLR 392.

352 *id.*, 472 (Hayne J).

of South Australia recommended the presumption be ‘replaced with a presumption in favour of the Crown being bound’, in their *Proceedings by and against the Crown* report in 1987.<sup>353</sup> The Committee went on to describe the effect of the proposed reform as being ‘to transfer the onus of rebutting the presumption from subject to Crown, the latter being the party best qualified to establish why it should not be affected by the legislation in question’.<sup>354</sup>

5.189 The Committee’s recommendation to reverse the immunity from statute was not followed by the South Australian Parliament at the time, but in 1990 amendments to the *Acts Interpretation Act 1915* (SA) brought about such a change.<sup>355</sup> Section 20 of the Act now states

20. (1) Subject to subsection (2), an Act passed after 20 June 1990 will, unless the contrary intention appears (either expressly or by implication), be taken to bind the Crown, but not so as to impose any criminal liability on the Crown.

(2) Where an Act passed after 20 June 1990 amends an Act passed before that date, the question whether the amendment binds the Crown will be determined in accordance with principles applicable to the interpretation of Acts passed before 20 June 1990.

5.190 This provision appears to respond to the decision of the High Court in *Bropho* on a number of levels. First, it accepts the premise that the functions of modern government make it appropriate to subject the Crown to statute, at least as a *prima facie* presumption. Second, the provision addresses the issue of the temporal application of a new rule regarding crown immunity, discussed in paragraphs 5.184–5.187.

5.191 Overseas agencies have similarly favoured the reversal approach. The Law Reform Commission of British Columbia (LRCBC)<sup>356</sup> identified the difficulty in determining when the Crown will be bound by ‘necessary implication’. The LRCBC’s report on civil rights in 1972 argued that the rule that a statute can bind the Crown only by express words might lead to injustices. Consequently, the LRCBC recommended that the British Columbian Interpretation Act 1979 be amended to provide that the Crown is bound by every statute in the absence of express words to the contrary.<sup>357</sup> These proposals were implemented by amendment to the Crown Proceedings Act 1979.<sup>358</sup> Similarly, the Ontario Law

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353 Law Reform Committee of South Australia *Proceedings by and against the Crown* Report 104 LRCSA Adelaide 1987, 22–23.

354 id., 23.

355 The majority of Committee had recommended effecting this reversal by amendment to the *Crown Proceedings Act 1972* (SA).

356 Law Reform Commission of British Columbia *Report on civil rights* LRCBC Vancouver 1972.

357 id., 64–65.

358 British Columbia Law Institute *Correspondence* 11 May 2000. This is effected by s 2(c) of the Act, which states that the ‘government is subject to all the liabilities to which it would be liable if it were a person’.

Reform Commission<sup>359</sup> recommended that the Ontario Interpretation Act 1980 be amended to provide that every Act and regulation made under it binds the Crown unless the Act or regulation specifically provides otherwise.<sup>360</sup> The Alberta Law Reform Institute also recommended that the presumption of crown immunity from statute be reversed in Alberta.<sup>361</sup> In both cases, these recommendations are yet to be implemented.<sup>362</sup> For a detailed discussion of the reasoning behind these recommendations, see paragraphs 5.54–5.61.

5.192 An alternative to reversal of crown immunity is its abolition. As noted above this alternative was recommended by the Law Reform Commission of NSW.<sup>363</sup> Abolition of the presumption means that the general words of a statute would be interpreted without the aid of any presumption, ‘if words were apt to apply to the Crown, they would apply in this way. If they were not, they would not so apply’.<sup>364</sup> Such a lack of guidance, however, might leave courts with interpretive difficulties and may lead them to conclude, in the light of the history of immunity, that statutes do not bind the Crown due to general notions of prerogative rights and inherent differences between the Crown and other legal persons.<sup>365</sup> The New South Wales Report recommended a provision to guide the courts in their interpretation, giving a list of considerations to be taken into account, ‘where, but for the old rule a legislative provision would bind the Crown’.<sup>366</sup> The provision directed that the Crown was not to be bound by a legislative provision if it was unlikely that the provision was intended to bind the Crown, having regard to the foreseeable extent to which the provision might impede crown activities, burden crown property, or fail in its legislative purpose.<sup>367</sup> This formula was criticised by the Ontario Law Reform Commission for its complexity, and for introducing a new set of interpretative difficulties.<sup>368</sup>

5.193 Reversal of the presumption is said to remove much of the uncertainty, by creating a new presumption that the Crown is to be bound, unless specific provision is made to the contrary. In support of this reform, the Ontario Law Reform Commission stated that this provided clear guidance to courts, and should be excepted only by express words or necessary implication, in line with the old

359 Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989.

360 id, 113.

361 See Alberta Law Reform Institute *The presumption of Crown immunity* Report No 71 ALRI Edmonton 1994.

362 Alberta Law Reform Institute *Correspondence* 13 May 2000; Bora Laskin Law Librarian *Correspondence* 29 April 2000.

363 New South Wales Law Reform Commission Report 24 *Proceedings by and against the Crown* NSWLRC Sydney 1976.

364 Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 109.

365 id, 104.

366 New South Wales Law Reform Commission Report 24 *Proceedings by and against the Crown* NSWLRC Sydney 1976, 76.

367 See Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 109–111.

368 ibid.

rule of construction, but in reverse operation. The Ontario Law Reform Commission conceded that there may be exceptions to the reversed presumption, but that these are best dealt with on an Act-by-Act basis. That is, rather than vague general rules regarding exceptions, each statute should be assessed as to whether or not, or to what extent, the immunity of the Crown should be expressly provided for and amended accordingly. This is the 'optimal approach to reform' in this area.<sup>369</sup>

5.194 No criteria were suggested by the Ontario Law Reform Commission for determining whether a particular Act is enforceable against the Crown. This leaves open the possibility that continuing to apply a rule of construction, albeit to an opposite effect, will equally plague the courts with interpretive difficulties. While exhaustive criteria may not be possible, a compromise might be to provide in legislation non-exhaustive criteria to assist the courts in making such decisions. Such criteria could include the legislative history of the statute; the impact of the decision on government activity; assessing the intent and purpose of the legislation, including whether the presumption is expressly or impliedly excluded or included; the effect of the statute on substantive rights and responsibilities; content and purpose of the particular provision; the identity of the entities involved and any public interest involved.

5.195 Reversal of the Crown's immunity from statute was also recommended by the Senate Standing Committee on Legal and Constitutional Affairs in its *The doctrine of the shield of the Crown* report.<sup>370</sup> In discussing the immunity afforded to government instrumentalities, the Committee stated

All new enactments, or modifications to legislation, should explicitly state whether a relevant organisation is entitled to Crown immunities from Commonwealth, State, Territory and/or local government laws. If no such statement were made then it would be presumed that the organisation would be bound by those laws. One important advantage of this approach would be the creation of greater certainty in the application of Territory, State and federal laws to Commonwealth and State corporations. These changes have become necessary given the uncertainty that has been created as a result of the decisions in *Bropho* and *Evans Deakin* in relation to the Crown's immunity from statute.<sup>371</sup>

5.196 In terms of implementation, there are three possible approaches. The British Columbian approach was to reverse the presumption with immediate effect in all existing and future statutes. The difficulty with this approach is that the Crown may inadvertently subject itself to statute from which it ought to be immune. The Prince Edward Island approach, was for the presumption to differ depending on the year of enactment of the statute. For pre-1981 statutes, the former presumption of immunity would remain for the life of the statute; for post-1981 statutes, the

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369    *ibid.*

370    Senate Standing Committee on Legal and Constitutional Affairs *The doctrine of the shield of the Crown* Commonwealth of Australia Canberra 1992, 113.

371    *ibid.*

presumption would be reversed. There is concern, however, as to whether the existence of two opposite presumptions would create confusion in the law. Thirdly, the Ontario Law Reform Commission suggested implementing the reversal at the next revision of Ontario statutes (which was in 1990), so each statute could be individually reviewed as to its need for a new immunity clause.<sup>372</sup> The possible problem with the Ontario approach is that, even where the courts may only find exceptions by 'express words or necessary implication', this may result in the exceptions being found in circumstances as vague and unpredictable as results from the present presumption.

### *The impact of section 64 of the Judiciary Act*

5.197 The wording of s 64, that the rights of the parties in a suit against the Commonwealth shall 'as nearly as possible' be the same as those which would exist in a suit between ordinary subjects, has ambiguous meaning. The opinion of the High Court has varied over the years as to whether the rights in question include substantive rights and, if so to what extent. The prevailing view is that s 64 does refer to substantive rights that exist prior to the commencement of a suit. Consequently, there is little controversy surrounding s 64 in respect of common law tort and contract claims, particularly when it is read together with s 56. However statutory claims are more complex in this regard, and a distinction must be made between substantive common law rights that must exist in order to bring a suit, and rights which are created wholly by statute without modifying pre-existing common law rights.

5.198 It was held by the High Court in *Baume v Commonwealth* and *Maguire v Simpson*<sup>373</sup> that s 64 applies to both substantive and procedural rights. Other cases have held that there must exist a suit in which the right to proceed against the Commonwealth has already been established before s 64 can have effect.<sup>374</sup> The matter appeared to have been settled, however, by the High Court in *Evans Deakin Industries*.<sup>375</sup> The Court stated that, although s 64 does not retrospectively create rights and obligations that did not exist before the commencement of a suit, it does operate to recognize liability that existed prior to the suit, and is sufficient to apply state legislation which modifies such liability.

5.199 It must be emphasised that, as is true of *Maguire v Simpson* and *Evans Deakin Industries*, most instances of s 64 applying a statute to the Crown have occurred in inter polity circumstances, where a Commonwealth statute is applied to a state or vice versa. The cases are discussed in detail below in paragraphs 5.212–5.261. Similarly, the ardent but failed attempts of the government of the day to

372 Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 112.

373 *Baume v Commonwealth* (1906) 4 CLR 97; *Maguire v Simpson* (1976) 139 CLR 362.

374 See for example *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 604 (McHugh, Kirby JJ).

375 (1986) 161 CLR 254.

overturn the decision in *Evans Deakin Industries* by amendment to s 64 are in the inter polity context and discussed below. There is no suggestion, however, that these cases intend to create a different rule for the intra polity situation. Indeed, by examining the law in Canada in this respect, it seems that the intra polity situation presents no additional issues.

5.200 In Canada, where the provincial crown proceedings legislation generally has 'rights of the parties' provisions similar to s 64 JA, such provisions have also been held to subject the Crown to statutory rights. In *Canadian Industrial Gas and Oil v Government of Saskatchewan*<sup>376</sup> the issue was whether the provincial government was required, pursuant to statute, to pay interest on a previous judgment debt. The statute in question was not binding on the Crown as a matter of construction, but was found by the Supreme Court of Canada to be binding by virtue of s 17 of the Saskatchewan Proceedings Against the Crown Act, which is in similar terms to s 64 JA.<sup>377</sup> The Court concluded that the previous judgment had found the plaintiff to be entitled to interest and that this substantive right, as modified by statute, was enforceable against the Crown.<sup>378</sup>

### ***Policy considerations***

5.201 After *Bropho*, the general presumption of immunity from statute provides only limited protection to each state Crown from its own laws and to the Commonwealth Crown from Commonwealth laws. Therefore, while the presumption of crown immunity from statute in such circumstances has not been reversed, exception to the rule appears more likely than previously. Such a situation opens the question of whether a simpler, more effective approach would be to reverse the presumption of immunity and specify the limited circumstances where it should apply by exception. In other words, to formally reform 'a custom more honour'd in the breach than the observance,'<sup>379</sup> and one which is founded on notions which were long ago abandoned in favour of those of equality, and social and economic realism.

5.202 ***Equality***. The underlying policy of equality before the law, discussed in paragraphs 5.38–5.41, is applicable to all forms of crown immunity and clearly supports its abolition or reversal. The High Court's decision in *Bropho* represents a major shift in judicial policy toward the primary goal of equality between government and citizen. The strictness of the general rule of construction was seen by the Court as outdated in the context of a growing tendency of the Crown to operate through its agents and where 'there are not infrequent occasions where it is

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376 [1979] 1 SCR 37.

377 'in proceedings against the Crown the rights of the parties are as nearly as possible the same as in a suit between person and person'.

378 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 225.

379 W Shakespeare *Hamlet* Act 1, Scene 4.

the legislative intent to bind all persons indifferently but where the legislature has not adverted to the possible need to single out the Crown or those acting on its behalf for distinct mention'.<sup>380</sup>

5.203 It has been argued that, if the legislature intends the Crown to benefit from special privileges, contrary to the notion of equality before the law, such intention could and should be clearly indicated by the legislature.<sup>381</sup> Hogg makes the point that the presumption of immunity has prevailed in the law without 'either proper understanding of the old cases or discussion of the reasons behind them,' and that no logical basis for the presumption exists.<sup>382</sup>

5.204 *Simplicity.* For many years, however, the prevailing view was that a presumption of immunity was by far the simplest position from which to approach a statute which purports to bind the Crown. This view essentially formed the basis of the *Bombay* decision, and is derived largely from the contention that '...it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words'.<sup>383</sup> Despite this, the existing presumption of immunity is said to be uncertain in scope and unpredictable in application, because of the vagueness of many statutes in their application to the Crown and the increasing range and number of situations in which the courts have found the presumption not to apply.<sup>384</sup> It has been argued by many law reform agencies in Australia and overseas that this needless complexity would be removed by reversal of the presumption.

5.205 It must be questioned, however, whether the suggested reforms are likely to achieve the desired result. Even if the Crown is *prima facie* bound by a statute, courts will still be required to determine whether the Crown is nonetheless immune by virtue of the statute's express words or necessary implication.<sup>385</sup> Given the long history of common law immunity, some judges might be too generous in finding immunity, thus restoring the unpredictability of outcome that the reform was intended to remove. As mentioned above, it might be that such unpredictability could be lessened by setting down in legislation a criteria for determining whether a statute is not applicable to the Crown.

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380 *Bropho v Western Australia* (1990) 171 CLR 1, 21.

381 D Kinley 'Crown immunity: A lesson from Australia?' (1990) 53 *Modern Law Review* 819, 824.

382 P Hogg *Liability of the Crown* 2<sup>nd</sup> ed LBC Ltd North Ryde 1989, 243; see also H Street 'The effect of statutes on the rights and liberties of the Crown (1948) 7 *University of Toronto Law Journal* 537.

383 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 123; *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 63.

384 P Hogg *Liability of the Crown* 2<sup>nd</sup> ed LBC Ltd North Ryde 1989, 243–244.

385 *ibid.*



5.206 ***Encouraging parliamentary consideration of immunity.*** If a statute is silent as to whether or not it binds the Crown, the common law presumption frees the Crown from any obligation that the statute might impose.<sup>386</sup> This silence is seldom the result of a deliberate decision on the part of the legislature to exempt the Crown from the operation of the statute. Typically, it results from the failure of drafters and legislators to advert to the issue of crown immunity at all.<sup>387</sup>

5.207 In its 1975 report, the Law Reform Commission of New South Wales indicated that the time-pressure under which legislation is drafted and debated, the complexity of the immunity issue, and the low priority of such questions when compared with other substantive provisions of the legislation, ensure that the immunity of the Crown is seldom addressed.<sup>388</sup> Moreover, because the common law presumption prevents prejudice to Crown interests, by protecting the Crown from obligations to which it has not expressly or by necessary implication been exposed, there is little incentive for Parliament to address the issue of crown immunity.

5.208 This argument is supported by examining statutes of a similar subject-matter, which often demonstrate such scattershot application to the Crown that no rational or consistent legislative policy may be discerned.<sup>389</sup> A strong inference may be drawn that crown immunity receives little or no legislative attention during drafting and debates. If the presumption of immunity were reversed, parliament would be forced to consider the terms of every statute to which it sought such immunity for the Crown.

5.209 ***Expansion of governmental activity.*** During the early years of development of the common law presumption of crown immunity, the activities of government were far more circumscribed than they are today. Although there may be no reliable guide to the activities that may be regarded as properly or essentially governmental,<sup>390</sup> nevertheless governments formerly confined their activities to principal functions such as the raising of taxes and the expenditure of income on

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386 Silence is intended here to mean the absence of both an express binding clause and a necessary implication that the Crown is bound.

387 New South Wales Law Reform Commission Report 24 *Proceedings by and against the Crown* NSWLRC Sydney 1976, 73–74; Ontario Law Reform Commission, *Report on the liability of the Crown* OLRC Toronto 1989, 108; P Hogg *Liability of the Crown* 2<sup>nd</sup> ed LBC Ltd North Ryde 1989, 244–245; G Williams *Crown proceedings* Stevens London 1948, 54; C McNair *Governmental and intergovernmental immunity in Australia and Canada* ANU Press Canberra 1978, 22; S Price ‘Crown immunity on trial: Desirability and practicality of enforcing statute law against the Crown’ (1990) 20 *Victoria University of Wellington Law Review* 213, 227; J Wolffe ‘Crown immunity from legislative obligations’ [1990] *Public Law* 14, 23.

388 New South Wales Law Reform Commission Report 24 *Proceedings by and against the Crown* NSWLRC Sydney 1976, 73–74.

389 id., 72–73; S Price ‘Crown immunity on trial: desirability and practicality of enforcing statute law against the Crown’ (1990) 20 *Victoria University of Wellington Law Review* 213, 227

390 *Bropho v Western Australia* (1990) 171 CLR 1, 19; *Inglis v Commonwealth Trading Bank* (1969) 119 CLR 334, 337 (Kitto J).

public goods and infrastructure. In modern times, governments engage in a vast range of commercial activity, often competing in the same markets as corporations from the private sector.<sup>391</sup> When the statute in question seeks to regulate the conduct of legal persons engaged in a field of commercial activity, there is clear tension between the government's role as regulator and its role as a competitor of the other legal persons it seeks to regulate.

5.210 In *Bropho*, the reasoning of the High Court was also based upon the premise that, in the light of the broad and increasingly nationwide commercial activity of governments, notions that laws are not intended to bind governments are outdated.

The historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavours and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents to compete and have commercial dealings on the same basis as private enterprise.<sup>392</sup>

5.211 The argument which emerges is that the purpose of regulatory legislation, formulated for the good of the community, should not be defeated by giving the Crown the benefit of a presumption of immunity from that legislation.<sup>393</sup> Although this argument does not justify the reversal of the presumption in all cases, it is a persuasive argument for reversing the presumption in relation to legislation that regulates commercial activity in which the Crown and its instrumentalities engage. In *Bropho*<sup>394</sup> the High Court recognised the force of this argument in its restatement of the common law presumption, which it preserved but weakened. The same argument points to a reversal of that presumption in the stated circumstances, and subsequent High Court decisions add further weight to this argument.

391 In Australia in recent years there has been a marked trend toward privatisation of government enterprises such as banks, airlines and resource utilities. This does not invalidate the claim made here, since these enterprises are only a small part of the commercial activity undertaken by governments.

392 *Bropho v Western Australia* (1990) 171 CLR 1, 19.

393 New Zealand Law Commission Report 17 *A new Interpretation Act to avoid 'prolixity and tautology'* NZLC Wellington 1990, 67; Ontario Law Reform Commission, *Report on the liability of the Crown*, OLCRC Toronto 1989, 108; P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 245; D Kinley 'Crown immunity: a lesson from Australia?' (1990) 53 *Modern Law Review* 819, 822–823; C McNairn *Governmental and intergovernmental immunity in Australia and Canada* ANU Press Canberra 1978, 22; J Peden 'The application of legislation to the commercial dealings of the Crown' (1977) 51 *Australian Law Journal* 757, 758–759, 763; S Price 'Crown immunity on trial: desirability and practicality of enforcing statute law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 219–220.

394 *Bropho v Western Australia* (1990) 171 CLR 1, 19.

**Question 5.36.** Should the common law presumption of Commonwealth immunity from statute be abolished? Alternatively, should the presumption be reversed by legislation so that the Crown in right of Commonwealth is prima facie presumed to be subject to federal laws?

**Question 5.37.** If the presumption of crown immunity from statute is to be abolished or reversed, should this be effected by amendment to s 64 of the *Judiciary Act*, by amendment to the *Acts Interpretation Act 1901* (Cth), or by enactment of a new statute to that effect? Should complementary amendments be made to all Commonwealth statutes which do expressly bind the Crown?

**Question 5.38.** If the presumption of crown immunity from statute is to be abolished or reversed, what exceptions should apply to this? How should such exceptions be introduced into the law?

**Question 5.39.** If the presumption of crown immunity from statute is to be reversed, should this occur a) immediately by amendment to all Commonwealth statutes, b) by amendment to future statutes only, or c) by amendment to statutes when they are reviewed generally?

**Question 5.40.** Whether or not the presumption is reversed, should clear criteria be developed to guide courts in determining whether the presumption ought to be departed from? Alternatively, should the courts be left to determine this through the ordinary processes of statutory construction?

## **Inter polity immunity — the federal dimension**

### ***Introduction***

[D]oes the rule apply to the Crown in all its capacities, or only to the Crown in right of the community whose legislation is under consideration? When construing a Commonwealth statute does “the Crown”, for the purpose of this rule, mean only the Crown in right of the Commonwealth or does it include the Crown in right of a State?<sup>395</sup>

5.212 In the inter polity situation, the degree to which the presumption of crown immunity prevails may impact on the Commonwealth in two ways. First, it determines the extent to which the Commonwealth is bound by state laws. Second, it determines the extent to which Commonwealth laws apply to the states.<sup>396</sup> The first is important to this inquiry because it affects the extent of Commonwealth liability; the second is also relevant because it determines how effective

<sup>395</sup> *Bradken Consolidated Ltd v Broken Hill Proprietary Co. Ltd.* (1979) 145 CLR 107, 116.

<sup>396</sup> In this section, for ‘state,’ read ‘state or territory’.

Commonwealth laws are in operation — a Commonwealth law may be rendered ineffective by its failure to apply to the states.

5.213 Leaving aside constitutional considerations, the questions whether a Commonwealth Act can bind the states, whether a state Act can bind other states, and whether a state Act can bind the Commonwealth, are the same: does a statute which binds the Crown of the enacting legislature also the Crown in its other capacities? Aside from the question of whether an Act is constitutionally invalid,<sup>397</sup> the High Court now considers all polities in a federation to be equal in so far as the construction of their statutes is concerned. Firstly, the rule from *Bradken*, extending the presumption of immunity from a Commonwealth Act to a state Crown, has been extended further to apply in all combinations of statute origin and polity. Secondly, the rule in *Bropho* has been extended from the intra polity situation to the inter polity situation. In addition, where a binding term exists in the statute, the competing theories regarding the extraterritorial operation of such terms are necessarily coloured by the policies underlying these developments. These policies are still hotly debated, however, both in Australia and overseas.

#### *The common law presumption*

5.214 For many years, opinion on the High Court was divided as to which of two views on the immunity of the Crown from statutes should prevail in a federal context.<sup>398</sup> The narrow view, which limits the scope of crown immunity, is that the presumption is confined to the Crown in right of the community whose legislation is in question and does not extend to the Crown in any other capacity. The wide view is that the presumption of immunity serves to shield the Crown in all its capacities, and is not limited to the Crown in right of the enacting legislature.<sup>399</sup>

5.215 For example, on the narrow view, the Crown in right of the Commonwealth would be presumed to be immune from the operation of a Commonwealth statute, but not from the operation of a New South Wales statute. On the wide view, the Crown in right of the Commonwealth would be presumed to be immune from the operation of all statutes enacted within the federation.

5.216 In the early days of federation, the narrower view prevailed. Accordingly, to determine whether the presumption was rebutted, it was held that, ‘... the doctrine of construction applies to the Government of the state in state Acts, to the Government of the Commonwealth in Federal Acts,’ but not otherwise.<sup>400</sup> This

397 ie by infringing s 61, or by s 109 inconsistency, as discussed in detail below in para 5.286–5.344.

398 See *R v Sutton* (1908) 5 CLR 789; *Pirie v McFarlane* (1925) 36 CLR 170; *Minister for Works (WA) v Gulson* (1944) 69 CLR 338; *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1.

399 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 201.

400 *R v Sutton* (1908) 5 CLR 806, 817.

reasoning was overturned, however, by the High Court in *Bradken*.<sup>401</sup> In this case, the applicants commenced an action against the Queensland Commissioner for Railways and other parties, claiming that the respondents had engaged in conduct in breach of the *Trade Practices Act 1974* (Cth). The matter was removed into the High Court, where the question arose as to whether the *Trade Practices Act* bound the Queensland Commissioner for Railways.<sup>402</sup> Although the Act expressly stated that it bound the Crown in right of the Commonwealth, it was silent on the question whether it intended to bind the Crown in right of a state.

5.217 In answering this question, the majority of the Court, led by Gibbs CJ, adopted the wide view of immunity in holding that the presumption of crown immunity from statute did extend to the Crown in all its capacities, and thus the general rule of construction applied to the Crown in the right of Queensland. Accordingly, the starting point was that the Crown in the right of Queensland was presumptively immune from the Commonwealth legislation, and one then had to examine whether express words or necessary implication compelled a different conclusion. The Court held that there was nothing in the *Trade Practices Act* to compel a different conclusion and that, accordingly, the legislation did not bind the Crown in right of Queensland. The effect of this was to place the commercial activities of the Commissioner beyond the reach of federal legislation that applied to other corporations, and whose purpose was to prevent certain trade practices that lessened competition.

5.218 The High Court reaffirmed the wide view of crown immunity in *Jacobsen v Rogers*,<sup>403</sup> stating

[i]t must, we think, now be regarded as settled that the application of the presumption that a statute is not intended to bind the Crown extends beyond the Crown in right of the enacting legislature to the Crown in right of the other polities forming the federation. Thus, in construing a Commonwealth statute, there is a presumption that it is not intended to bind the Crown in right of the various States as well as the Crown in right of the Commonwealth.

5.219 This seems to remove the possibility of confining the wide presumption to the situation confronted in *Bradken* — a Commonwealth statute binding the Crown in right of a state. Indeed, lower court cases following *Bradken* indicated that the wide presumption applies to a state Act binding the Crown in right of another state,<sup>404</sup> and to a state Act binding the Crown in right of the Commonwealth.<sup>405</sup>

401 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

402 The Court unanimously held that the Commissioner represented the Crown in right of Queensland and so was entitled to such immunities as were available to the Queensland Crown.

403 (1995) 182 CLR 572, 585 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ)

404 *Commissioner for Railways (Qld) v Peters* (1991) 24 NSWLR 407. But compare the divergent views in *Public Curator of Queensland v Morris* (1951) 51 SR (NSW) 402.

405 *Trade Practices Commission v Manfal Pty Ltd* (1990) 92 ALR 416; *Re Commissioner of Water Resources* [1991] 1 Qd R 549.

*Rebutting the presumption by express words*

5.220 The most straightforward means of rebutting the presumption of crown immunity is through a clause that expressly binds the Crown. However, even when such a clause exists, complications may arise. Binding clauses may be general or particular. A general clause is in the form ‘This Act binds the Crown,’ and raises the question whether the Act intends to bind the Crown in all its capacities, or only in right of the enacting legislature. A particular clause is in the form ‘This Act binds the Crown in right of New South Wales’ and raises related, though not identical problems.<sup>406</sup>

5.221 A statutory provision that ‘This Act binds the Crown’ is potentially ambiguous in its intent. On the one hand, it might be said that the same scope should be given to a general binding clause as is given to the general presumption of immunity. Since *Bradken* extends the presumption of immunity to the Crown in all its capacities, the removal of immunity from ‘the Crown’ should also extend to the Crown in all capacities. The link between these two issues has seldom been explored, but some judges have regarded the one proposition as a corollary of the other, and both propositions as stemming from the indivisibility of the Crown.<sup>407</sup> On the other hand, it may be argued that the presumption of crown immunity is a common law principle which, unless modified by statute, applies throughout Australia. Any attempt to remove that immunity by legislation emanates from a particular legislature, be it federal, state or territorial. It may be argued that the intention of the legislature would ordinarily be to confine the expression to the Crown of that legislature.

5.222 In New South Wales and Victoria the matter is specifically resolved by interpretation legislation, which provides that a reference to ‘the Crown’ in an Act of that state is a reference to the Crown in right of that state.<sup>408</sup> There is also a more general provision found in the interpretation legislation of most Australian jurisdictions to the effect that a reference in any Act of that jurisdiction to ‘a locality, jurisdiction or other matter or thing’ is a reference to such a locality, jurisdiction or other matter or thing ‘in and of’ that jurisdiction.<sup>409</sup> Arguably these provisions confine a reference to the Crown to the Crown ‘in and of’ that jurisdiction. Accordingly, such a general binding clause would not evince an intention to remove an immunity enjoyed by the Crown in any other capacity.

406 See *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 136 (Mason and Jacobs JJ), 141 (Murphy J) for differing views of the effect of the particular binding clause in s 2A, *Trade Practices Act 1974* (Cth).

407 *Washington v Commonwealth* (1939) 39 SR (NSW) 133, 136 (Jordan CJ); *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 356 (Rich J).

408 *Interpretation Act 1987* (NSW) s 13(b); *Interpretation of Legislation Act 1984* (Vic) s 38.

409 See eg *Acts Interpretation Act 1901* (Cth) s 21(b), and cognate legislation in other jurisdictions.

5.223 The cases are equivocal in their acceptance of these views. *Uther v Federal Commissioner for Taxation* raised the question of whether New South Wales legislation bound the Crown in right of the Commonwealth in so far as the legislation in question denied priority, in the course of a winding up, to certain tax debts owed to the Commonwealth by a company. The New South Wales legislation provided that its material parts ‘shall bind the Crown’. Latham CJ and Dixon J expressed the view that ‘the Crown,’ when appearing in a New South Wales Act, should be understood as referring only to the Crown in right of New South Wales.<sup>410</sup> On the other hand, Rich, Starke and Williams JJ stated or implied that these words in the New South Wales Act were intended to bind the Crown in all its capacities.<sup>411</sup> Other cases fail to resolve the difference of opinion evident in *Uther* — some limiting a general binding clause to the Crown in right of the legislating community,<sup>412</sup> others regarding it as extending to the Crown in every capacity.<sup>413</sup>

5.224 The views of Latham CJ and Dixon J accord with the principle of construction that a statute is presumed not to have extraterritorial effect, and they are consistent with the statutory analogue of that rule, by which things are generally to be regarded as things ‘in and of’ the enacting jurisdiction. However, this approach limits the circumstances in which crown immunity is rebutted, and thus creates an asymmetry with *Bradken* and its broad casting of the net of immunity.

5.225 Where an Act contains a particular clause binding the Crown, then uncertainty remains regarding the inter polity situation. If the clause states that the Act ‘binds the Crown in the right of NSW,’ this guarantees that the Act is binding on NSW, but leaves open the question whether it binds other polities.

**Question 5.41.** When a statute contains a general clause binding ‘the Crown,’ should this be presumed to a) bind the Crown in the right of the enacting legislature only, subject to implication according to the general rule of construction, or b) bind the Crown in all capacities? Should this be set down in legislation?

410 (1947) 74 CLR 508, 515 and 527 respectively. Nevertheless, they both found that the Act in question bound the Commonwealth, due to its specific wording.

411 (1947) 74 CLR 508, 524, 525, 538–539.

412 *Re Young’s Horsham Garage Pty Ltd* [1969] VLR 977, 978.

413 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 356 (Rich J); *Attorney-General (Eng) v Sorati* [1969] VR 88, 99.

***Rebutting the presumption by implication***

5.226 The primary issue when determining whether the presumption of immunity is rebutted in the inter polity situation, is whether the decision in *Bropho* is to be read together with the decision in *Bradken*. That is, while the situation in *Bropho* was in respect of both the Western Australia Crown and legislation and thus intra polity, does the rule set down by the High Court extend to the inter polity situation? Alternatively, should the strict rule of construction from the *Bombay* case continue to protect a polity from statutes whose enactment it played no part in?

5.227 In terms of the facts in *Bropho*, this issue would have arisen if the legislation protecting Aboriginal sites and objects had been Commonwealth legislation, or, alternatively, that the proposed development of the Swan Brewery site in Perth was to be carried out by a Commonwealth instrumentality. It would then have been necessary to determine, respectively, whether the Crown in right of Western Australia is immune from the operation of the Commonwealth statute, and whether the Crown in right of the Commonwealth is immune from the operation of the Western Australian statute. As is discussed in paragraphs 5.275–5.278, this is a controversial policy issue. In Australia, the High Court has clearly presumed that the reasoning in *Bropho* would not have differed if the facts were those of an inter polity situation.

5.228 In *Registrar, Accident Compensation Tribunal v Taxation Commissioner*,<sup>414</sup> the *Income Tax Assessment Act 1936* (Cth) was applied to the Victorian Accident Compensation Tribunal as an instrumentality of the Crown in right of Victoria. It was not necessary for the High Court to apply its earlier decision in *Bropho*, as it was found that there was no prejudice to the Crown when applying the statute to the Tribunal. However, the Court clearly suggested that in different circumstances, *Bropho* would have applied to determine whether the state Crown was bound by the federal Act.

Whatever may have been the situation in earlier times, it is clear from *Bropho* that the presumption that general words do not bind the Crown is one that must now yield to 'the circumstances (involved), including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises'.<sup>415</sup>

5.229 In *Jacobsen v Rogers*, the High Court emphasised that its decision not to re-examine the reasoning of the Court in *Bradken* was made 'particularly in the light of the decision of this Court in *Bropho v Western Australia*'.<sup>416</sup> On this basis, the Court later stated that *Bropho* was applicable to determine whether the right of search and seizure under the Commonwealth *Crimes Act 1914* was binding on the

414 (1993) 178 CLR 145 (Mason CJ, Deane, Toohey, Gaudron JJ).

415 (1993) 178 CLR 145, 171

416 *Jacobsen and Another v Rogers FC* (1995) 182 CLR 572, 585.



Department of Fisheries of Western Australia. In respect of whether the presumption of crown immunity prevented the relevant provision binding the department (as a manifestation of the Western Australian Crown), the Court held that ‘it is to s 10 itself — to its subject matter and evident purpose — that one must turn for any indication that the presumption is rebutted’.<sup>417</sup>

5.230 In the recent case of *Bass v Permanent Trustee* the issue was whether the State of New South Wales is a ‘person’ within the meaning of the *Trade Practices Act*. Although the question of crown immunity was not central to the outcome in this case, the Court concluded that the rule of construction as applied in *Bradken* was extended by *Bropho* and that ‘it was subsequently held in *Bropho v Western Australia* that the presumption discussed in *Bradken* was no longer to be treated as an inflexible rule involving a stringent test of necessary implication’.<sup>418</sup>

5.231 While the above cases all involve the binding effect of Commonwealth Acts on a state, there was nothing in the decisions to suggest that the reasoning did not apply to other inter polity situations. In terms of Commonwealth immunity from state Acts, therefore *Bradken* has the effect that a state Act is presumed not to bind the Commonwealth, and *Bropho* has the effect that, in addition to express words and necessary implication in the terms of the state Act, the presumption may be rebutted by implication from the Act’s subject matter or disclosed purpose and policy.

5.232 However, the recent decision in *Commonwealth v Western Australia* illustrates that applying these tests to the Commonwealth in practice may prove complex in many cases. Further, as discussed below, in a case where a state Act purports to bind the Commonwealth, exceptions to the rule in *Bropho* may be so extensive as to render the rule inapplicable.

### ***Commonwealth v Western Australia***

5.233 In *Commonwealth v Western Australia*,<sup>419</sup> the High Court considered the question whether a Western Australian statute bound the Crown in right of the Commonwealth. This was the reverse of many of the cases on the application of the presumption, where the application of Commonwealth statutes has been considered in relation to the Crown in right of a state.

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417 (1995) 182 CLR 572, 586–7 (Mason CJ, Deane, Dawson, Toohey, Gaudron JJ).

418 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 346, citing *Bropho v Western Australia* (1990) 171 CLR 1, 19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). Note that *Bropho* has also been applied by the High Court as a rule of statutory construction generally: *Qantas Airways Limited v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 167 ALR 529.

419 (1999) 160 ALR 638.

5.234 The particular issue in the case was whether a Commonwealth defence area could be the subject of Western Australian legislation that granted the use of certain Crown land and private land for mining. The High Court held that the land did not fall within the definition of ‘Crown land’, or ‘private land’ in the *Mining Act 1978* (WA) and the Commonwealth was immune from grants made over its land pursuant to that Act. The Act contained no express reference to binding the Commonwealth Crown and, although it did apply to ‘Crown land’, there were broad exemptions for state functions.<sup>420</sup>

5.235 While the Court agreed that the Commonwealth should not be bound by the *Mining Act 1978* (WA) there were some differences in approach amongst the justices as to the presumption of crown immunity and the effect of *Bropho* and *Bradken*.

5.236 Gleeson CJ and Gaudron J in a joint judgment preferred a more restricted version of the presumption of crown immunity from statute. Their honours suggested that the presumption was that a statute that regulates the conduct or rights of individuals does not apply to members of the executive government of any of the polities of the federation, government instrumentalities and authorities intended to have the same legal status as the executive government, or their servants or agents.<sup>421</sup> Their Honours referred to this as the presumption that legislation does not apply to members of the executive government. Moreover, their Honours said that the case before them was concerned with a ‘slightly different presumption’ — that a statute does not divest the Crown of its property, rights, interests or prerogatives unless that is clearly stated or necessarily intended.<sup>422</sup> They referred to this as the presumption that legislation does not affect government property.

5.237 Their Honours cited *Bradken* as authority that the general rule of construction applied to the Crown in all capacities, and *Bropho* for authority that the rule ‘is not to be treated as an inflexible rule involving a stringent test of necessary implication’.<sup>423</sup>

5.238 Gummow J in his judgment referred to *Bropho* in respect of its contemporary conception of government activities, though he characterised the issue in narrower terms as one that depended upon the ‘express terms...or necessary intendment’ of the Act.<sup>424</sup> His Honour concluded that the land was not ‘Crown land’, as this clearly referred to the Western Australian Crown. If therefore private land, it could only be acquired by resumption under the *Land Acquisition and*

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420 *Mining Act 1978* (WA) s 8.

421 (1999) 196 CLR 392, 410.

422 id, 410.

423 *Commonwealth v Western Australia* (1999) 196 CLR 392, 409 (Gleeson CJ, Gaudron J).

424 id, 432–433 (Gummow J).

*Public Works Act 1902* (WA). However, a ‘serious constitutional question’ would arise if the land were to be resumed from the Commonwealth. This situation apparently invoked an exception to the rule in *Bropho*, in that, rather than the Commonwealth being bound by implication from the subject matter, purpose or policy of the Act, ‘it would be expected that the legislature would have plainly indicated that intention’.<sup>425</sup> Kirby J agreed with Gummow J’s construction of the *Mining Act* and its inapplicability to the Commonwealth.<sup>426</sup> Taylor suggests that Gummow J’s view could be seen as a reference to the more stringent pre *Bropho* test — one view is that *Bropho* simply removed the word ‘necessary’ from the test for whether a statute binds the Crown.<sup>427</sup>

5.239 Hayne J referred on a number of occasions simply to the presumption that one polity in the federation does not intend to bind another polity.<sup>428</sup> His Honour suggested that the presumption owed its origin to the fact of federation and was not ‘encrusted with’ the extensive history of statements of the rules of statutory construction as mentioned in *Bropho*.<sup>429</sup> As a consequence the strength of the presumption was unlikely to change over time. McHugh and Callinan JJ agreed with Hayne J on these points.<sup>430</sup>

5.240 Hayne J also referred to *Bropho*, concluding that ‘there would be a powerful indication of an intention that the *Mining Act* should extend to land held by the Commonwealth if, on its face, it sought to prescribe a regime governing mining on all land in the State’ but that this was not the case, and the land in question did not fall within the requisite definitions of the Act.<sup>431</sup> Taylor argues that Hayne J’s reasoning distinguishes the presumption in the context of a state statute affecting the Commonwealth executive from *Bropho* and directly contradicts what the majority of the Court said in *Jacobsen*.<sup>432</sup>

5.241 Taylor’s view is that the Court, despite some differences in approach, properly applied the presumption to the case both in terms of law and policy and that the approach is also consonant with the law of Canada and the United States.<sup>433</sup>

425 id, 435 (Gummow J) also 474–475 (Hayne J).

426 id, 447.

427 G Taylor ‘Commonwealth v Western Australia and the operation in federal systems of the presumption that statutes do not apply to the Crown’ (2000) 24 *Melbourne University Law Review* 77, 119. (1999) 196 CLR 392, 469, 473–5.

428 id, 473.

429 id, 421 (McHugh J), 479 (Callinan J).

430 id, 472–475 (Hayne J).

431 G Taylor ‘Commonwealth v Western Australia and the operation in federal systems of the presumption that statutes do not apply to the Crown’ (2000) 24 *Melbourne University Law Review* 77, 119.

432 id, 80.

5.242 The approach of the Court in respect of the rule from *Bropho* is by no means clear in *Commonwealth v Western Australia*. While no judge explicitly overruled the decision in *Bropho*, it was clear that the principle set down in that case could not be readily applied to the facts in *Commonwealth v Western Australia*. Arguably, therefore, the High Court has now established that, in cases where state legislation purports to bind the Commonwealth, one must apply the general rule of construction as it was applied in *Bradken*.

5.243 The above discussion of the intricacies of the case law raises the issue of whether there should be a legislative response to clarify the nature and impact of any presumption as to a statute binding the Crown. Taylor suggests that Australian cases on the presumption that statutes do not bind the Crown are in a ‘state of flux’.

On the one hand, there is the majority decision in *Jacobsen*, a case concerning State governments and Commonwealth statutes, which completely ignores the presumption’s different functions in inter polity cases. On the other hand, there is the decision in *Commonwealth v Western Australia*, in which two judgments expressly, and one arguably, recognised that different function — but in a case involving the Commonwealth government and State statutes...that is precisely the situation in which s 109 of the Australian Constitution and intergovernmental immunity doctrines combine to make the presumption almost superfluous. It is in the *Jacobsen* situation — Commonwealth statute, State governments — in which it is needed most.<sup>434</sup>

5.244 In addition to the complexities that the High Court has dealt with when extending *Bropho* to the inter polity situation, there remains in other courts and jurisdictions some confusion and disagreement on this point. In *Rogers v Moore*,<sup>435</sup> a Full Court of the Federal Court held that, in the absence of express words or necessary implication, s 10 of the *Crimes Act 1914* (Cth) was binding on neither the Commonwealth nor the states. The Court clearly saw *Bradken* and *Bropho* as coexistent principles to be applied in such cases. Black CJ stated that ‘in my view the authority of *Bradken* on this point is unaffected by the subsequent rejection by the High Court in *Bropho* of the tests applied in the Province of Bombay Case’.<sup>436</sup> Shepherd J, on the other hand, held that, ‘[t]o the extent that the approach in *Bradken* differed from the approach of the judges in *Bropho*, it is *Bropho* which must be applied...’<sup>437</sup>

5.245 Despite the weight of authority, the approach of extending *Bropho* beyond the boundaries of the Crown of the enacting legislature has also been criticised in academic writings as being too wide. It has been argued that, when deciding whether a federal statute is binding on a state, the federal environment should not permit such easy regulation of one government by another as would occur by applying *Bropho*.

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434 id, 122.

435 *Peter Rogers v Kenneth Moore; Johannes Jacobsen and Terence Lester Dibb* (1993) 115 ALR 347.

436 id, 351 (Black CJ).

437 id, 368 (Shepherd J).

It remains appropriate...to apply the test which had been applied to determine it pre-*Bropho*, regardless of the fact that a different, significantly more easily satisfied, test may be appropriate when determining whether a statute, federal or states, impliedly binds the Crown that has participated in its enactment.<sup>438</sup>

5.246 This policy position is not supported in Australian cases, but is evident in recent judgments of the Supreme Courts of Canada and the United States, which have adopted the policy of statutory immunity amongst polities on the basis that a federal system demands independence of its components in order to function democratically.<sup>439</sup> For example, the Supreme Court of Canada held that ‘any exception to the normal crown immunity rule based on a necessary implication should be narrowly confined’, to circumstances where there existed

expressly binding words; (2) an intention revealed when provisions are read in the context of other textual provisions; and, (3) an intention to bind where an absurdity, as opposed to an undesirable result, were to occur if the government were not bound.<sup>440</sup>

5.247 In so far as the various law reform agencies have addressed crown immunity from statute, none are federal agencies and so none contemplate the inter polity situation. However this leaves unresolved the most difficult reforms applicable to our federal system. These issues are discussed in detail below in paragraphs 5.275–5.285.

**Question 5.42.** Should the wide view of crown immunity in the inter polity situation, (set down in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107) continue to apply?

**Question 5.43.** If *Bradken* is to be applied regarding the binding effect of statutes in the inter polity situation, should the more lenient rule of statutory construction set down in *Bropho v Western Australia* (1990) 171 CLR 1 be applied, rather than the rule applied in *Bradken*? If not what rule should apply?

**Question 5.44.** If the rules from *Bropho* and *Bradken* are to be applied, both in the intra polity and inter polity situations, should they be replaced by statutory provisions? If so, what form should such provisions take? Should these provisions be located in the *Judiciary Act*, the *Acts Interpretation Act*, or in some other legislation?

438 L Katz ‘The test for determining the applicability to the states of federal statutes which do not expressly bind them’ (1994) 11 *Australian Bar Review* 222, 225.

439 *Peter Rogers v Kenneth Moore; Johannes Jacobsen and Terence Lester Dibb* (1993) 115 ALR 347; *Will v Michigan Department of State Police* 491 US 58 (1989); *Alberta Government Telephones v Canadian Radio-Television and Telecommunications Commission and CNCP Telecommunications* [1989] 61 DLR (4<sup>th</sup>) 227 (Dickson CJC).

440 *Alberta Government Telephones v Canadian Radio-Television and Telecommunications Commission and CNCP Telecommunications* [1989] 61 DLR (4<sup>th</sup>) 227 (Dickson CJC).

*The impact of section 64 of the Judiciary Act*

5.248 In nearly all cases, the debate regarding the effect of s 64 on the Commonwealth's immunity from statute has been directed at the inter polity situation. In respect of state tort and contract laws, s 64 has been found to clearly impose substantive and procedural liability on the Commonwealth.<sup>441</sup> Section 64 has also been applied to impose liability for other common law claims,<sup>442</sup> such as those which arise from the implied right to sue for breach of statutory duty,<sup>443</sup> and to impose liability arising from certain other statutory rights.<sup>444</sup>

5.249 Consequently, where a state Act codifies or modifies common law rights, it is binding on the Commonwealth by virtue of the 'enabling' force of the *Judiciary Act*.<sup>445</sup> That is, because s 64 JA has an 'ambulatory effect,' and thus applies to the state of the law as it changes over time, statutory modifications of the common law are consequently within the scope of sections 56 and 64 JA.<sup>446</sup> In such cases, the rights in question have been read widely, to include both substantive and procedural rights. Where a claim is pursuant to a statute without a common law basis, however, the application of s 64 is more controversial. This debate is best illustrated by the decisions in *Australian Postal Commission v Dao* and *Commonwealth v Evans Deakin Industries*.

5.250 In *Dao*, two employees of the Australian Postal Commission brought proceedings in the New South Wales Equal Opportunities Tribunal alleging sexual discrimination by fellow employees under the *Anti Discrimination Act 1977* (NSW). It was held in the New South Wales Court of Appeal, however, that employees of the Commission were not subject to the Act. McHugh J held that 'Section 64 does not begin to operate as against the Commonwealth until the plaintiff has a cause of action which he can bring against the Commonwealth'.<sup>447</sup> Kirby J agreed, adding that, although it was settled that s 64 applies substantive as well as procedural rights, 'section 64 does not create causes of action. It assumes that a state law that applies to the Commonwealth validly creates a cause of action'.<sup>448</sup> In his reasoning, Kirby P stated as follows.

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441 See *Maguire v Simpson* (1977) 139 CLR 362.

442 See para 5.116–5.152 above.

443 *Strods v Commonwealth* [1982] 2 NSWLR 182.

444 *Commonwealth v Evans Deakin Industries* (1986) 161 CLR 254. See S Kneebone *Tort liability of public authorities* LBC Information Services North Ryde (1998), para 8.3.1.

445 L Zines *The High Court and the Constitution* 4th ed Butterworths Sydney 1997, 273; see also G Donaldson 'Commonwealth liability to state law' (1985) 16 *University of Western Australia Law Review* 135, 139.

446 *Maguire v Simpson* (1977) 139 CLR 362. See P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 225.

447 *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 604 (McHugh J).

448 *id*, 583 (Kirby J).

If s 64 enables a plaintiff to create a cause of action against the Commonwealth, then the Commonwealth, although in breach of no obligation whatever to the plaintiff, becomes retrospectively in breach of a statutory obligation upon the commencement of the suit. This is tantamount to saying that, by reason of s 64, the Commonwealth, as between itself and its subjects, is bound by every State Act applicable as between citizen and citizen, since any citizen affected by Commonwealth activity carried out contrary to the State Act can enforce that Act against the Commonwealth. It would be remarkable if the Commonwealth intended to subject itself to such far reaching liability by the words of s 64.<sup>449</sup>

5.251 In *Evans Deakin Industries* the High Court disagreed with the above reasoning in *Dao*.<sup>450</sup> The issue was whether the *Subcontractors Charges Act 1974* (Qld) applied in proceedings instituted in Queensland by a subcontractor against the Commonwealth. The Commonwealth had contracted a company, Maltry Pty Ltd, to carry out construction work on the Eastern Creek Airport, and Maltry had subcontracted the plaintiff, Evans Deakin Industries. Maltry owed monies to the plaintiff, but went into liquidation before settling its account. Under the Act the plaintiff subcontractor was entitled to a charge over the contractors fee in respect of the subcontract work, and if such work was not paid for by the contractor, could file a notice of claim of charge to recover monies from the employer of the contractor, in this case, the Commonwealth. The Commonwealth claimed immunity from the Act and refused to pay the plaintiff. The parties agreed that the Act did not bind the Commonwealth of its own force, but disagreed as to the effect of s 64 in picking up the relevant provisions of the Act. The Commonwealth argued that, prior to filing the claim and commencing the suit, the plaintiff had no rights under the Act in respect of the monies, which were until then legally payable to the contractor.

5.252 The High Court held that the Act did apply to the Commonwealth. The Court was in part persuaded by its conviction that s 56 JA could not be a source of substantive rights, as it applies only to cases where the Commonwealth is a defendant,<sup>451</sup> but stated in respect of s 64 that

[i]f it is possible to say that once a suit is commenced the Commonwealth will be held liable, it follows that it can also be said, before the suit is commenced, that the events which have happened have created a liability which will be recognized and enforced in legal proceedings...It is therefore only a half-truth to say that s.64 has the effect that upon the commencement of a suit the Commonwealth becomes subject to obligations which did not exist beforehand. The section does not have a retrospective operation. At all times before a suit is commenced, it can be known what the rights of the parties will be once the suit is commenced.<sup>452</sup>

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449 id, 604 (Kirby J).

450 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

451 id, 267.

452 id, 266. Approved in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 350.

5.253 In furtherance of this reasoning, the Court held that the phrase ‘as nearly as possible,’ in s 64 means ‘as completely as possible,’<sup>453</sup> and that

in every suit to which the Commonwealth is a party s.64 requires the rights of the parties to be ascertained, as nearly as possible, by the same rules of law, substantive and procedural, statutory and otherwise, as would apply if the Commonwealth were a subject instead of being the Crown. That result seems entirely just; the Commonwealth acquires no special privilege except where it is not possible to give it the same rights and subject it to the same liabilities as an ordinary subject.<sup>454</sup>

5.254 Similarly, in *Whiteford v Commonwealth* two judges of the New South Wales Supreme Court held s 64 subjected the Commonwealth to the *Residential Tenancies Act 1987* (NSW).<sup>455</sup> In this case, the Commonwealth had leased premises to the appellant pursuant to the Act, and had in the first instance commenced proceedings to recover possession of the premises from the appellant. The Commonwealth was successful, judgment entered in its favour and a writ of possession entered. The appellants then sought a stay of execution on the basis of s 71 of the Act, which states that no proceedings for recovery of possession may be commenced in the Supreme, District or Local Courts. It was held that s 64 JA was applicable and exposed the Commonwealth to the effect of the New South Wales Act.

Since the appellants would have been able to rely upon s 71 if their landlord had been a subject i.e. an ordinary Australian citizen or resident, rather than the Commonwealth, s 64 had the effect of permitting them, indirectly, to rely on the s 71 as a defence to the action initiated by the Commonwealth.<sup>456</sup>

5.255 It should also be noted that s 64 may apply certain provisions of an Act, notwithstanding that other provisions do not apply. For example, in *Strods v Commonwealth of Australia*,<sup>457</sup> it was held that an action for breach of the statutory duty created by the provisions of the *Factories, Shops and Industries Act 1962* (NSW) may succeed against the Commonwealth. This was despite a finding that the provisions of that Act which prescribe penalties for breach of an obligation to adopt safety measures, and those which provide for the inspection and supervision of factories, had no application to the Commonwealth.

5.256 While it is clear that ‘the rights of the parties’ in s 64 extends beyond procedural rights to substantive rights, it is equally clear that there are limits to its operation in this regard. Where the Commonwealth is a plaintiff or defendant in civil proceedings, sections 56 and 64 subject the Commonwealth to all statutes that would have been applicable to a private party.<sup>458</sup> However, if a statute does not

<sup>453</sup> *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 265.

<sup>454</sup> *id.*, 264.

<sup>455</sup> *Whiteford and Anor v Commonwealth of Australia* (1995) 38 NSWLR 100.

<sup>456</sup> *id.*, 107 (Kirby J).

<sup>457</sup> *Strods v Commonwealth of Australia* (1982) 2 NSWLR 182.

<sup>458</sup> P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 244.



modify a pre-existing common law right which is thus clearly enforceable against the Commonwealth by virtue of the *Judiciary Act*, it cannot bind the Commonwealth, unless it can be found to do so as a matter of statutory construction. In other words, while s 64 rebuts the Commonwealth's immunity from statute in the circumstances mentioned, it does not do so for claims that are entirely created by statute. Because the *Judiciary Act* is no more powerful than any other federal act, it cannot subject the Commonwealth to federal statutory provisions which clearly exclude the Commonwealth.

5.257 In this regard, the width of the finding in *Evans Deakin* was strictly confined by the High Court in the recent case of *Bass v Permanent Trustee Co Ltd*. The Court distinguished between legislation that creates rights in anticipation of a subsequent suit,<sup>459</sup> and legislation by which such rights cannot be created because of inconsistency either with a Commonwealth law pursuant to s 109 of the Constitution, or with subsequent laws of the same legislature.<sup>460</sup> The Court noted that 's 64 does not operate to confer rights by reference to all subsequent legislation'.<sup>461</sup> It cited with approval the decision in *Deputy Commissioner of Taxation v Moorebank Pty Ltd* that 'where a Commonwealth legislative scheme is complete upon its face, s 64 will not operate to insert into it some provision of state law for whose operation the Commonwealth provisions can, when properly understood, be seen to have left no room'.<sup>462</sup> In *Bass*, this rule was applied to find that s 75B of the *Trade Practices Act 1974* (Cth), which did not apply to the Commonwealth or the states as a matter of construction, was not therefore applicable by way of s 64 JA. In other words, s 64 JA enjoys no more general or superior operation than any other federal legislative provision.

5.258 Similarly, in *Commonwealth v Western Australia*,<sup>463</sup> the claim that the *Mining Act 1978* (WA) bound the Commonwealth in respect of mining entitlements over a federal Defence Practice Area was found not to be a 'suit' and thus to be outside the ambit of s 64 JA. Gleeson CJ and Gaudron J held that 'an application for the grant of a mining tenement is not an application to determine existing legal rights and obligations. Rather, it is an application for the creation of new rights and obligations'. Consequently, the proceedings were 'not a "suit" for the purposes of s 64 JA'.<sup>464</sup>

459 as in *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

460 As was the case in *Dao v Australian Postal Commission*. In *Deputy Commissioner of Taxation v Moorebank Pty Ltd* it was said that s 64 is 'neither a constitutional provision nor an entrenched law ... [and] can be expressly or impliedly amended or repealed by a subsequent Act': (1988) 165 CLR 55, 63. See also *Downs v Williams* (1971) 126 CLR 61 with respect to the application of *Claims against the Government and Crown Suits Act 1912* (NSW) in circumstances involving a subsequent inconsistent New South Wales Act.

461 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 351.

462 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55, 64.

463 *Commonwealth v Western Australia* (1999) 160 ALR 638, regarding a claim that mining may occur on Commonwealth land.

464 id, 651 (Gleeson CJ, Gaudron J).

5.259 A distinction must be drawn, therefore, between the ability of s 64 to provide substantive statutory rights to parties in furtherance of existing rights, and its inability to subject the Commonwealth to a claim by conferring a new substantive right, which is created wholly by a statute. This was elucidated clearly in the judgment of Hayne J in *Commonwealth v Western Australia*. As to s 64, his Honour clearly recognized that ‘the rights referred to in the section are more than procedural and include the substantive rights to which effect is to be given in the suit’. However, he noted that, in this case, binding the Commonwealth with the state law would not make the rights of the parties as nearly as possible the same as they would be in a suit between *subject and subject*. Rather, it would make the rights of the parties the same as they would be in a suit between *the state* and a subject, and ‘this is to create rights and obligations that are not provided for by the legislation and that would not be recognised or enforced in any proceeding between subject and subject’.<sup>465</sup>

5.260 The Court in *Commonwealth v Western Australia*, also qualified the decision in *Evans Deakin* regarding the meaning of ‘as nearly as possible’ in s 64. The Court held as follows.

The phrase ‘as nearly as possible’ cannot operate to alter the nature of respective rights in relation to different subject matter. Further, here the Commonwealth acquired the freehold and leasehold titles for defence purposes and was thus performing a function peculiar to government. The phrase ‘as nearly as possible’ does not embrace such a situation.<sup>466</sup>

5.261 Whatever meaning is given to the words ‘as nearly as possible’ in s 64, it is clear that ‘they cannot be regarded as preserving in every case the special position of the Crown...’<sup>467</sup> This is particularly relevant to the question whether the Commonwealth is bound by statute in the same way as ordinary citizens, as discussed in detail in paragraphs 5.120–5.122 and 5.197–5.200.

#### ***Failed attempts to amend section 64***

5.262 There were three unsuccessful attempts to amend s 64 following the decision in *Evans Deakin*. As discussed below, this decision gave rise to concerns that s 64 JA, in its present form, had the effect of subjecting the Commonwealth to substantive liability under any legislation which the states and territories might enact to regulate ordinary citizens, including statutes that did not bind the *state* itself. Given the qualifications to the decision in *Evans Deakin* mentioned above, the exposure of the Commonwealth to *state* laws is perhaps not as great as feared at the time of the amending Bills. On the other hand, the constitutional limits on the

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<sup>465</sup> id 703 (Hayne J).

<sup>466</sup> id, 671 (Gummow J).

<sup>467</sup> *Maguire v Simpson* (1977) 139 CLR 362, 402 (Mason J). See L Zines *The High Court and the Constitution* 4<sup>th</sup> ed Butterworths Sydney 1997, 321.

ability of the states to regulate the Commonwealth (discussed in paragraphs 5.286–5.303) have become less extensive following recent High Court decisions.<sup>468</sup> In any case, the Bills were opposed and ultimately lapsed on the basis that the wide reading of the effect of s 64 reflects the appropriate policy governing the application of the *Judiciary Act*.<sup>469</sup>

5.263 The Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989 (and its amended 1990 version) sought to limit the extent to which the Commonwealth is bound by statute, both by its own interpretative cl (5) and a clause to amend s 64 JA (cl 13). Clause 5 specified that the Commonwealth was only to be subject to written laws which bind it of their own force by express words or necessary implication, and to codified tort laws. Clause 13 similarly sought to amend s 64 JA by specifying that this provision does not operate to pick up rights created by a written law that does not otherwise apply to the Commonwealth as a matter of its own construction.

5.264 The explanatory memorandum to the Bill states, somewhat vaguely, that in its interpretation of s 64 the decision in *Evans Deakin* ‘goes further than necessary,’ to fulfil the provision’s purpose of preventing states when sued in federal jurisdiction from relying on the substantive immunities of the Crown — a purpose which, alleges the memorandum, may be in any case achieved by s 79 JA in respect of *state* legislation and by amendment to Commonwealth and territory legislation.<sup>470</sup>

5.265 The Bill also provided that, if there were to be exceptions to this new rule, then the Commonwealth could specify in its own legislation those classes of *state* and territory legislation that should apply to the Commonwealth and its instrumentalities. In addition, the Commonwealth would have the regulation-making powers to deal with other classes of laws and with any special problems; as ‘this provides the necessary flexibility to respond quickly to new ... legislation’.<sup>471</sup>

5.266 In the Attorney-General’s Second Reading Speech, Lionel Bowen stated that the Bill was necessary to clarify a dangerously uncertain situation in respect of the application of s 64 and that

468 *Re Residential Tenancies Tribunal of New South Wales v Henderson & Anor; Ex parte Defence Housing Authority (Henderson’s case)* (1997) 190 CLR 410,

469 *S Kneebone Tort liability of public authorities* LBC Information Services North Ryde 1998; para 8.8. The Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989, The Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1990, Law and Justice Amendment Bill (No 2) (1991); *Hansard* (H of R) 1989 Vol 167, 3298–3300 (Attorney-General Bowen).

470 The Parliament of the Commonwealth of Australia Senate Commonwealth and Commonwealth Instrumentalities (Application of Laws Bill) 1989 – *Explanatory memorandum* 15051/89 (1989).

471 *Hansard* (H of R) Second Reading Speech 31 May 1989, 3299 (Attorney-General Bowen).

[a]s a result of the *Evans Deakin* decision, the Commonwealth is subject to the risk of incurring unforeseeable kinds of liabilities under whatever legislation the States and self-governing Territories might enact from time to time in relation to ordinary persons...In the interests of the community, the Commonwealth and the States and Territories, the legal position should be clarified and those risks removed.<sup>472</sup>

5.267 In arguing against the Bill, the shadow Attorney-General stated that the Opposition did not accept that the motives of the Government were to clarify *Evans Deakin* or to prevent the anomalous application of *state* laws and substantial risk to the executive. Rather, the underlying motive was to subvert the intention in s 64 that the Government and the ordinary citizen should be equal before the law. The opposition raised six objections to the Bill. These were that

- ?? it significantly eroded the rights of subjects against the Commonwealth and its instrumentalities
- ?? it reversed the presumption of equality and replaced it with a scheme of limited liability of the Commonwealth
- ?? it would be unjust in its operation as an Act, as it would have been had it existed and been applied by the High Court in *Evans Deakin*
- ?? it was based upon a determination to place the Commonwealth above the law
- ?? it allowed the Government to make further changes favourable to the Commonwealth and damaging to the citizen through the unreviewable mechanism of subsequent regulation
- ?? it was ineffective, replacing a well understood rule whose problems in practical application are best resolved by the courts.<sup>473</sup>

5.268 The Opposition relied on the submission of the New South Wales Bar Association, and in particular concluded that

[o]ur objections to the Bill, to put them succinctly, are, first of all, that it is not necessary; secondly, that it will lead to even more Commonwealth power, as I have already said, and, thirdly, it will discriminate against the individual citizen because the result of the bill will be that the Commonwealth will not be subject to laws to which the individual citizen will be subject. The Commonwealth will be putting itself above the law, the law that applies to citizens, which the opposition maintains is a very unhealthy step for the Commonwealth to be taking.<sup>474</sup>

5.269 The Law and Justice Legislation Amendment Bill (No 2) (1991)<sup>475</sup> was another attempt to ameliorate the effects of *Evans Deakin* or, as the Explanatory Memorandum puts it, to qualify the application of s 64 'in the light of certain

472 *ibid.*

473 *Hansard* (H of R) Second Reading Speech 4 September 1989, 883 (Spender).

474 *id.*, 874 (Brown).

475 The Parliament of the Commonwealth of Australia Senate *Law and Justice Legislation Amendment Bill (No. 2) (1991) – Explanatory Memorandum* 30157 (1991).

anomalies highlighted by the High Court's decision' in this case.<sup>476</sup> The amendment was by way of inclusion of subsections (2) and (3) to s 64. Section 64(2)(a) provided that a party suing the Commonwealth is not given, by subsection (1), any right against the Commonwealth which a state or territory law would have not have given the party if suing that state or territory. This amendment was intended to 'overcome one of the main anomalies of the *Evans Deakin* case, ie that the Commonwealth may in effect be bound by a state or territory law which the enacting state or territory legislature has decided is not suitable to bind the state or territory itself'.<sup>477</sup>

5.270 Section 64(2)(b) removed any right to sue the Commonwealth for damages for breach of statutory duty under a state or territory law, regardless of whether the enacting polity was bound. Whether or not the Commonwealth was to be bound would be determined by way of regulation. Section 64(3), was to supplement subsection (2) by providing that, when a party is suing a state, subsection (1) does not pick up any statutory right which would not otherwise have applied.

5.271 This Bill was thus different, from the earlier Bills in two respects. Firstly, it was less protective of Commonwealth immunity in so far as it allowed the Commonwealth to be bound where the polity of the enacting legislature was bound. Such an approach did not allow the Commonwealth the free reign of the earlier Bills in determining to which legislation it was subject. Secondly, however, the 1991 Bill went further than the 1989 Bill, in exempting the Commonwealth from liability for breach of statutory duty and in providing some protection for the states from the operation of s 64 JA.

5.272 In the Senate Second Reading Speeches, the government presented its case simply along the lines of the explanatory memorandum. In addition to the perceived need to avoid a state legislature exempting its own polity from its statutes while binding other polities, subsection (2) was seen as necessary to prevent the Commonwealth from becoming liable to 'possibly very large damages on the basis of new state or territory laws which have been enacted primarily from a state viewpoint and without adequate regard to the Commonwealth's special needs or problems'.<sup>478</sup>

5.273 The Bill was opposed and again lapsed. The Opposition posed two arguments, which were generally supported by the Democrats.<sup>479</sup> First, the Bill provided that the Commonwealth had a broader immunity from s 64 than the states. This was because the Bill exempted the Commonwealth from the application of state laws that would not apply to it but for s 64, while in the case of

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476 id, 4.

477 id, 5.

478 *Hansard* (Sen) Second Reading Speech 7 November 1991, 2712 (Senator Collins).

479 *Hansard* (Sen) Second Reading Speech 26 November 1991, 3384 (Senator Spindler).

claims against the states, the new provisions merely provided that s 64 would not give a party any right under a statute that they would not have but for s 64. Second, in respect of statutory obligations, the Bill preserved the right of the Commonwealth to exempt itself by way of regulation, and 'such an important measure should be dealt with by statute, but not by delegated legislation'.<sup>480</sup>

5.274 In addition, a recent submission to the Commission from the New South Wales Government reflects a view diametrically different from that upon which the above Bills were premised. The New South Wales Attorney-General's Department supports an interpretation of s 64 which accords with 'the policy that governments in general should not enjoy any special immunity from general laws unless express and specific provision is made for such'.<sup>481</sup>

**Question 5.45.** Should s 64 of the *Judiciary Act* apply only to procedural rights, or should it also apply to substantive rights? Should s 64 be amended to clarify this?

**Question 5.46.** If s 64 of the *Judiciary Act* confers substantive rights on parties in suits involving the Commonwealth, should this include rights that are created by statute, or be limited to pre-existing rights which may be modified by statute? Should s 64 be amended to clarify this?

**Question 5.47.** In what circumstances, and to what extent, should substantive liability of the Commonwealth be allowed to differ from that applicable to ordinary citizens? Should s 64 be amended to clarify those circumstances in which a claim is not one which could arise 'between subject and subject'?

**Question 5.48.** Should s 64 be amended to ensure that it does not subject the Commonwealth to state Acts from which the state would be immune if proceedings had been commenced against the state rather than the Commonwealth?

**Question 5.49.** Should the Commonwealth be able to immunise itself from state legislation by way of its regulatory powers alone, as proposed in the Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bills 1989 and 1990, and the Law and Justice Amendment Bill (No 2) (1991)? Should this be clarified by amendment to the *Judiciary Act*?

480 id, 3383.

481 Attorney-General New South Wales *Submission J002*, 4–5.

**Policy considerations*****Equality and federalism***

5.275 In respect of the Crown of the enacting legislature, the rule prior to *Bropho*, that a statute was not binding on the Crown in the absence of express terms or necessary implication, was clearly considered ill-founded.<sup>482</sup> As stated, the High Court in *Bropho* reached this conclusion on the basis that it was no longer necessary or justifiable for the activities of governments to be cloaked with the special privilege of immunity at the expense of equality between government and citizen. However, it has been argued that the same conclusion does not follow as easily when considering whether a statute should bind the Crown in the right of other polities, where different equality issues may impact. In particular, this latter situation involves issues of federalism, which do not arise from the former situation.<sup>483</sup>

5.276 The argument is that *Bropho* is too wide a rule to apply in a federal system, that the intra and inter polity legislative environments are necessarily quite different in character, and that the federal balance requires that different entities within a federation cannot be subject to regulation by each other. Citing the authorities discussed below, Katz J has stated in extra-curial comment that the general rule of construction cannot equally apply in these two environments as '[a] significant distinguishing feature of the two situations is that the second involves issues of federalism which the first does not, federalism not having ceased to be regarded as a fundamental principle in Australian law'. Consequently, while there is no question of the power of the federal Parliament to make laws binding on the states, the rule of construction which applies to such laws must remain 'unambiguous', irresistible' and 'unmistakable'.<sup>484</sup> Gibbs CJ stated that 'it is only prudent to require that laws of Parliament should not be held to bind the states when the Parliament itself has not directed its attention to the question whether they should do so'.<sup>485</sup> As discussed in paragraphs 5.54–5.61 and 5.191–5.193, such arguments find support in some overseas jurisdictions.

5.277 The decision of the Court in *Bradken* supports the federalist standpoint. However, the majority of judges in *Bradken* did not articulate such arguments in making their decision. The reasons given for extending the presumption of immunity to the Crown in all capacities were inconsistent, some relying on precedent, some on the doctrine of the indivisibility of the Crown'.<sup>486</sup> Gibbs J was

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482 See L Katz 'The test for determining the applicability to the states of federal statutes which do not expressly bind them' (1994) 11 *Australian Bar Review* 222, 226.

483 *ibid.*

484 *id.*, 225.

485 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 122. But see P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 194.

486 Mason and Jacobs JJ, 135–136. See para 5.21–5.26.

the only judge who supported his conclusion, in part at least,<sup>487</sup> on the basis of federalism, stating

[i]t is a consequence of our federal system that 'two governments of the Crown are established within the same territory, neither superior to the other'. Legislation of the Commonwealth may have a very different effect when applied to the government of a State from that which it has in its application to ordinary citizens. It seems only prudent to require that laws of the Parliament should not be held to bind the States when the Parliament itself has not directed its attention to the question whether they should do so.<sup>488</sup>

5.278 Of course, in addition to such broad policy issues, there are issues of the practical application of the resulting legal principles. The case of *Commonwealth v Western Australia* demonstrates that, where a statute is applied to another polity, particularly the Commonwealth, there may be complex issues which do not exist in respect of the enacting polity. In addition to the constitutional issues in respect of the executive power of the Commonwealth, discussed in paragraph 5.286–5.303, the subject matter and disclosed purpose and policy behind a statute is often far more difficult to construe in respect of polities which did not participate in its enactment. While the principle in *Bropho* may be extended to such cases, therefore, its application is subject to certain limitations. Consequently, as a general rule of construction, it may be difficult and confusing to apply.

### *Simplicity*

5.279 As is noted in respect of the intra polity situation, reform of the presumption of immunity by its reversal or abolition is supported by arguments that the law would be significantly simpler if this were the case. As seen in *Commonwealth v Western Australia*, however, the worst complexities do not stem from the simple intra polity situation with which most law reform agencies have dealt, but from the application of the common law presumption to a federal context in which the Crown exists in many rights. Any solution which does not contemplate these situations is thus confined to the least troublesome cases.

5.280 As Hogg puts it, 'the reason for the complexity of the law is that the courts, resisting the conclusion that the Crown is not bound by statutes, have engrafted many exceptions onto the basic rule'.<sup>489</sup> The argument in favour of the reversal of

487 Gibbs J also made the claim that legislation is intended to regulate citizens, not governments. This appears to be contrary not only to the words of s 64 JA, but the intention of the Constitution and the majority of case law, as discussed above.

488 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 123, citing *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 312 (Dixon J).

489 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 243. See also New Zealand Law Commission Report 17 *A new Interpretation Act to avoid 'prolixity and tautology'* NZLC Wellington 1990, 64–65; Ontario Law Reform Commission Report on the liability of the Crown OLRC Toronto 1989, 107; G Williams *Crown Proceedings* Stevens London 1948, 53–54; S Price 'Crown immunity on trial: desirability and practicality of enforcing statute law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 225, 227, 241.



immunity is that it would collapse the present process of applying presumptions, rules of exception or rebuttal, then exceptions to those rules. However uncertain or confusing it may be to apply the rule in *Bropho* in practice, it remains a mechanism that will often result in a statute binding all manifestations of the Crown. Some of the uncertainty may therefore derive from the fact that, despite its function as an exception to the Crown's immunity from statute, *Bropho* leads to the immunity being eliminated in more cases than it is upheld. As expressed by the Ontario Law Reform Commission

[t]he broad and various exceptions and distinctions that have been created with respect to the presumption of Crown immunity have nearly eaten away the rule. By virtue of these developments, most statutes now, in fact, apply to the Crown. To the extent that the change is one of substance, removing Crown immunity, we expect that it will generally be desirable. Crown immunity should be the exception and not the rule.<sup>490</sup>

5.281 On the one hand, this may suggest that the uncertainty would be removed in many cases by reversing the underlying presumption of crown immunity from statute, no matter the origin of the statute or the version of the Crown in question, and placing the onus on the Crown to establish an exception to the reversed rule. If the presumption of immunity were reversed, the rule in *Bropho* could be replaced by a rule by which the court could determine the validity of the relatively small range of potential exceptions.

5.282 On the other hand, cases such as *Commonwealth v Western Australia* demonstrate that the inter polity situation includes so many potential circumstances in which the Crown in all capacities should not be bound by a statute, that the presumption of immunity in this situation may remain a simpler starting point. As discussed in paragraphs 5.32–5.33, however, such practical arguments cease to be convincing unless there is a clear majority of cases in which the Crown ultimately is or is not immune to statute. That is, where a general rule need only be excepted in a small number of cases, reversing that rule is unlikely to be desirable. On the other hand, where such a rule has a large number of possible exceptions, which are invoked in most cases, its reversal can simplify the task of deciding whether the rule should prevail. Where there is a significant proportion of cases both upholding the rule and excepting it, the simplicity factor must give way to more fundamental policy issues.

### ***Expansion of governmental activity***

5.283 As stated above, the prevailing view of the High Court is that the rule from *Bropho* should apply to statutes which purport to bind other polities in a federation. This view is primarily based upon an expanded version of the argument in *Bropho*

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490 Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 112.

that the contemporary incarnation of government is one which operates frequently as a player in the private marketplace. Such a marketplace is divided into different jurisdictions, and thus a player may engage in activities regulated by the legislation of a variety of polities. The Commonwealth and the states and territories may engage in business across jurisdictional boundaries, and do so increasingly easily as technology advances. In such circumstances, just as the distinction between private and government entities is inequitable in most cases, so the distinction between the enacting government and other governments is neither relevant nor just - all competitors in the marketplace should be equally subject to the regulatory structure of that market place, and none more equal than others.

5.284 Ironically perhaps, *Bradken*<sup>491</sup> itself illustrates the infelicity of applying the common law presumption of immunity more rigorously in the inter polity situation than in the intra polity situation. In this case, the Queensland Commissioner for Railways was held exempt from the operation of provisions of the *Trade Practices Act 1974* (Cth) concerning restrictive trade practices. Yet the relevant activities of the Commissioner were ordinary commercial dealings for the purchase, from private corporations, of equipment and rolling stock for use on its railways. Non-governmental corporations engaged in such trade and commerce would have been bound by the Act.<sup>492</sup> Similarly to the intra polity situation, therefore, it is argued that where a statute regulates an activity which all of the community may engage in, in the best interests of that community, it should not be subject to anomalous exception where the Crown of another polity engages in the regulated activity.<sup>493</sup> Again, the decisions of the High Court since *Bropho* and *Bradken*, in approving of such reasoning, may be in favour of reversal or abolition of the presumption of immunity.

5.285 In *Jacobsen v Rogers*, it was held that a Commonwealth Act was binding both on the Commonwealth and the State of Western Australia. The modern conception of government, identified in *Bropho*, was again emphasised as determinative when construing statutes in an inter polity environment. The High Court stated that it is 'important to recognize that the Crown, being relevantly the executive branch of government, carries out in modern times multifarious functions involving the use and occupation of many premises and the possession of many

491 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

492 See also *R v Eldorado Nuclear Ltd* (1983) 4 DLR (4th) 193.

493 New Zealand Law Commission Report 17 *A new Interpretation Act to avoid 'proximity and tautology'* NZLC Wellington 1990, 67; Ontario Law Reform Commission Report on the liability of the Crown OLRC Toronto 1989, 108; P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 245; D Kinley 'Crown immunity: a lesson from Australia?' (1990) 53 *Modern Law Review* 819, 822-823; C McNairn *Governmental and intergovernmental immunity in Australia and Canada* ANU Press Canberra 1978, 22; J Peden 'The application of legislation to the commercial dealings of the Crown' (1977) 51(11) *Australian Law Journal* 757, 758-759, 763; S Price 'Crown immunity on trial: desirability and practicality of enforcing statute law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 219-220.

things'.<sup>494</sup> In *Bass v Permanent Trustee* the Court similarly referred to the reasoning in *Bropho*, that the expanded commercial activities of governments militate against their immunity from statute, and that

the same considerations and the nature of our federal structure make expressions such as 'shield of the Crown', 'binding the Crown' and, more particularly, 'binding the Crown in right of the Commonwealth' and 'binding the Crown in right of the States' inappropriate and potentially misleading when the issue is whether the legislation of one polity in the federation applies to another.<sup>495</sup>

**Question 5.50.** If the common law presumption of crown immunity from statute is to be reversed or abolished in the intra polity situation, should the presumption continue to be applied in the inter polity situation, or should it also be removed?

**Question 5.51.** What, if any, are the relevant differences between the intra and inter polity situations which must be reflected in any reforms to the presumption of crown immunity from statute? How might such differences be reflected in any statute which removes the presumption generally?

## Immunity from statute — constitutional issues

Prior to [*Henderson*] it was generally thought that the Commonwealth was substantially (though not absolutely) immune from State legislation. Now, the Commonwealth is bound by most State legislation...<sup>496</sup>

5.286 In the inter polity situation, statutory construction is only a preliminary question. It is necessary to then consider the legislative competence of the state legislature to enact a law which purports to bind the Crown in the right of the Commonwealth.<sup>497</sup> The Constitution preserves the executive power of the Commonwealth and protects it from the operation of state legislation in two ways. Firstly, in the course of creating a federal executive government, the Constitution implies that such government must be allowed to carry out its functions under s 61 of the Constitution, regardless of laws of the states which are technically binding and restrictive of it. Secondly, the Constitution expressly provides in s 109 that, where state and Commonwealth laws are inconsistent, the Commonwealth law shall prevail.<sup>498</sup>

<sup>494</sup> *Jacobsen and Another v Rogers FC* (1995) 182 CLR 572, 587.

<sup>495</sup> *Bass v Permanent Trustee Co Ltd* [1999] 198 CLR 334, 347, citing *Bropho v Western Australia* (1990) 171 CLR 1, 19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). Note that *Bropho* has also been applied by the High Court as a rule of statutory construction generally: *Qantas Airways Limited v Christie* [1998] HCA 18 (19 March 1998), *X v Commonwealth* [1999] HCA 63 (2 December 1999).

<sup>496</sup> N Seddon 'Crown immunity and the unlevel playing field' (1998) 5 *Agenda* 4, 468.

<sup>497</sup> N Dixon 'Limiting the doctrine of intergovernmental immunity' (1993) 9 *QUT Law Journal* 6.

<sup>498</sup> *Re Residential Tenancies Tribunal of New South Wales v Henderson & Anor; Ex parte Defence Housing Authority (Henderson)* (1997) 190 CLR 410, 426 (Brennan CJ).

5.287 In addition to the scenario where a state Act purports to bind the Commonwealth, the scenario where a state Act purports to bind another state also raises the issue of the constitutional validity of the Act. The High Court has generally considered this issue to be commensurate with the issue of whether a state Act can bind the Commonwealth, although clearly s 109 has no application in such a situation.<sup>499</sup> In respect of Commonwealth Acts, however, it is clear that the Commonwealth has the power under the Constitution to bind the states, provided that it does not do so in a discriminatory manner.<sup>500</sup>

5.288 From the vacillations of High Court decisions over many years it is clear only that, where the Commonwealth's activities fall within the objects and subject matter of a state Act, the Commonwealth may to some limited degree be 'affected' by such legislation. However, in *Henderson's* case the High Court introduced a new, apparently much broader test for the constitutional validity of state legislation that purports to bind the Crown in right of the Commonwealth. The operation of s 109 was similarly construed as very limited in this regard by the majority of the Court. Though potentially reducing the Commonwealth's immunity from state legislation, however, the varied judgments comprising the decision in *Henderson's* case have proven uncertain and difficult to apply.

5.289 As a constitutional issue, reforms to the *Judiciary Act* will be necessarily limited in their capacity to clarify the law in this regard. However, the constitutional issue has arguably become less important to the validity of inter polity legislation after *Henderson's* case. Consequently, the validity of such legislation is now more likely to depend upon its effect as determined by the general rule of statutory construction. As a result, the potential of the *Judiciary Act* to determine the Commonwealth's immunity from state statute is expanded. It is possible to specify, in general federal legislation, the degree to which legislation may bind the Crown in other polities, or to reverse the presumption that it does not. In addition, it is now unlikely that the Constitution will play a significant role in overriding any such provision.

### State legislation and the executive power of the Commonwealth

5.290 The Constitution describes the executive power of the Commonwealth in s 61 as follows

<sup>499</sup> In a recent case 'in accordance with the spirit of the *Residential Tenancies Tribunal* case in that in each case it was held that a government body should be bound by another government's legislation' it was held that a New South Wales statutory corporation (the Superannuation Board) was bound by the *Stamp Act 1921* (WA) when purchasing a property in Western Australia: *State Authorities Superannuation Board v Commissioner of State Taxation for the State of Western Australia* (1996) 140 ALR 129.

<sup>500</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

5.291 The executive power of the Commonwealth is thus not only given priority over that of other polities in the Commonwealth, but is cast broadly. Consequently, the validity of state legislation that regulates an activity of the Commonwealth executive as a matter of judicial construction, is left almost entirely to judicial interpretation. The broad rule developed by the courts was that such power could arise as a crown prerogative or be conferred by federal statute, and thus may be affected, but not altered, by state legislation. As Brennan J put it in *Henderson*, 'the executive power of the Commonwealth may be modified by valid laws of the Commonwealth but it is beyond the legislative reach of the States'.<sup>501</sup>

5.292 In the early post federation cases, the 'implied immunities' doctrine held that, given two levels of government — federal and state/territory — in the one geographical territory, the governments must generally be immune from each other's laws.<sup>502</sup> This was not so much a consequence of the Constitution, as a function of federalism as a political construct.<sup>503</sup> In *Engineers*, however, the 'implied immunities' doctrine, along with the 'reserved state powers' doctrine, was overruled. It was held that valid laws made in the Commonwealth are binding on all people in the Commonwealth whether as individuals or as 'political organisms'.<sup>504</sup>

5.293 Following *Engineers*, this new doctrine was applied to find that Victorian motor vehicle legislation applied to an Royal Australian Air Force member who was charged with unlicensed driving,<sup>505</sup> and that the *Companies Act 1936* (NSW) was effective in binding the Commonwealth and ruling out its priority for debts.<sup>506</sup> Some prerogatives, such as the functions of the Governor-General to dissolve Parliament, were held to be beyond state legislative power, as they are not for the 'peace, order and good government of' the state.<sup>507</sup> These aside, the High Court emphasised the need for both state and federal laws to operate, subject to inconsistency, within the realm of the Commonwealth, recognising that the Commonwealth 'lives and moves and has its being within a system of law which

501 *Re The Residential Tenancies Tribunal of NSW and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410, 424 (Brennan J). See also *Brown v West* (1990) 169 CLR 195, 205; see also *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

502 *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087; *R v Sutton* (1908) 5 CLR 789; *R v Barger* (1908) 6 CLR 41.

503 T Blackshield *Australian constitutional law and theory* 2<sup>nd</sup> ed Federation Press Melbourne 1998, 231.

504 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 153.

505 *Pirrie v McFarlane* (1925) 36 CLR 170.

506 *In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner Of Taxation* (1947) 74 CLR 508. See also *West v Commissioner of Taxation* (1937) 56 CLR 657.

507 *In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner Of Taxation* (1947) 74 CLR 508, 521.

consists of the common law (in the widest sense) and the statute law of the various States'.<sup>508</sup>

5.294 However, the High Court gradually retreated from this view. While the Court continued to recognize that the Commonwealth could be 'affected by'<sup>509</sup> state laws (such as laws construing contracts entered into in a state), the extent to which state laws were able to control the Commonwealth was limited and unclear. Decisions of the Court varied, though rarely to the effect that the Commonwealth was found to be bound by a state law.<sup>510</sup> The High Court's decision in *Commonwealth v Cigamatic Pty Ltd*<sup>511</sup> determined for many years that the scope of state legislation in this respect was very limited. The issue in *Cigamatic* was whether the Commonwealth had priority over debt, despite state legislation to the contrary. It was held that the states have no 'legislative power to control legal rights and duties between the Commonwealth and its people,' or to 'directly derogate from the rights of the Commonwealth with respects to its people'.<sup>512</sup> This rule was subsequently applied broadly to immunise the Commonwealth from state laws.

The breadth of the constitutional immunity of the Commonwealth according to the *Cigamatic* doctrine meant that the ability of the Commonwealth to bind the States was dramatically greater than the ability of the States to bind the Commonwealth.<sup>513</sup> Professor Zines has argued that the decision in *Cigamatic* is wrong,<sup>514</sup> particularly in the light of the finding that s 64 of the *Judiciary Act* extends to substantive law.<sup>515</sup> This has been supported widely in academic commentary,<sup>516</sup> although it is clear that s 64 is not always effective in rendering the Commonwealth liable to state laws.<sup>517</sup>

5.295 In line with this reasoning, the majority of the High Court in *Henderson* departed from a strict application of the *Cigamatic* doctrine and reformulated the test for the constitutional validity of state legislation.<sup>518</sup> In this case, the Commonwealth Defence Housing Authority claimed immunity from the *Residential Tenancies Act 1987* (NSW), which empowered a landlord to inspect

508 id, 522 (Latham CJ).

509 See *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (In Liquidation) (1940) 63 CLR 278, 308; *In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 528; *Australian Postal Commission v Dao* (1985) 63 ALR 1, 33; G Donaldson 'Commonwealth liability to state law' (1985) 16 *University of Western Australia Law Review* 135.

510 See for example *Commonwealth v Bogle* (1953) 89 CLR 229, 260. See also *Victoria v Commonwealth (Pay-roll Tax)* (1971) 122 CLR 353, 410 (Walsh J).

511 (1962) 108 CLR 372, 378 (Dixon CJ).

512 *Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372, 378 (Dixon CJ).

513 P Lane *Commentary on the Australian Constitution* LBC Information Services North Ryde 1997, 886.

514 See L Zines *The High Court and the Constitution* (4th ed) Butterworths Sydney 1997, 319.

515 *Maguire v Simpson* (1977) 139 CLR 362. See *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 427 (Kitto J).

516 For example T Blackshield *Australian constitutional law and theory* 2<sup>nd</sup> ed Federation Press Melbourne 1998.

517 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55.

518 *Re The Residential Tenancies Tribunal of NSW and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410, 455 (McHugh J), 438–439 (Dawson, Toohey and Gaudron JJ), 507–508 (Kirby J).

premises rented through the Authority. The Court distinguished between invalid laws affecting the Commonwealth's executive capacity, or 'which would detract from or adversely affect the very governmental rights of the Commonwealth',<sup>519</sup> and those valid laws that affect only the exercise of executive capacity,<sup>520</sup> where the executive engages in activity that is regulated by a state law of general application.<sup>521</sup> When combining the various judgments in *Henderson*, the test which emerged was that a state law may be binding on the Commonwealth where

- ?? it is a law of general application regulating an area of activity that the Commonwealth chooses to engage in<sup>522</sup>
- ?? as a law of general application, it extends to the Commonwealth as a matter of construction (ie not expressly)<sup>523</sup> and
- ?? it is not inconsistent with a valid Commonwealth law.<sup>524</sup>

5.296 It should be noted, however, that various of the Judges imposed even greater limitations on the *Cigamatic* doctrine. Kirby J advocated the narrowest test for Commonwealth immunity; that it applies only where state legislation singles out the Commonwealth for discriminatory treatment or impairs the integrity or autonomy of the Commonwealth government. In addition, McHugh<sup>525</sup> and Gummow J<sup>526</sup> advocated the threshold restriction that issues of Commonwealth immunity do not exist where the executive power arises from Commonwealth legislation, rather than from the Constitution. In such cases, a state law will apply subject to any inconsistency in terms of s 109 of the Constitution.

5.297 The revised test from *Henderson* significantly erodes the Commonwealth's constitutional protection from state laws, although the precise extent to which it does so remains unclear.<sup>527</sup> An important implication of this is the significant weight that is consequently added to the rule from *Bropho*. That is, if there is a negligible constitutional impediment to state law binding the Commonwealth Crown, other than s 109, the only impediment is a rule of statutory construction, which is now much easier to satisfy. If, as has been argued, the effect of *Henderson* is that the general immunity of the Commonwealth from state laws has been

519 id, 437 (Gummow J).

520 id, 439 (Dawson, Toohey, Gaudron JJ).

521 Note that in *Henderson* the Defence Housing Authority also argued that s 64 JA had no application to the proceedings before the Tribunal. The Court agreed, stating that the Tribunal was not a court exercising federal jurisdiction and thus that proceedings before it did not constitute a 'suit' for the purposes of s 64: id, 460 (McHugh J), 474 (Gummow J), 509 (Kirby J), 448 (Dawson, Toohey and Gaudron JJ).

522 id, 427 (Brennan CJ).

523 id, 438–439 (Dawson, Toohey and Gaudron JJ), 507–508 (Kirby J).

524 id, 469 (Gummow J).

525 id, 459 (McHugh J).

526 id, 469 (Gummow J).

527 M Gladman 'Re Residential Tenancies Tribunal of New South Wales and Henderson; ex parte Defence Housing Authority (1997) 190 CLR 410: 'States' power to bind the Commonwealth', (Comment) (1999) 27 *Federal Law Review* 151.

rendered inapplicable in most cases,<sup>528</sup> this raises the question of whether the presumption of such immunity should be reversed.

### Section 109 of the Constitution

5.298 Where the power to legislate on one or more topics is concurrently held by the Commonwealth and the states, as in most of the powers listed in s 51 of the Constitution, s 109 provides that the laws of the Commonwealth shall prevail over those of a state to the extent of any inconsistency.<sup>529</sup> Inconsistency is present for the purposes of s 109, and the Commonwealth law prevails, if

- ?? it is impossible to obey both laws
- ?? one law purports to confer a legal right, privilege or entitlement which the other law purports to take away or diminish, or
- ?? the Commonwealth law evinces a legislative intention to 'cover the field'.<sup>530</sup>

5.299 In terms of Commonwealth immunity from statute, a consequence of s 109 is that the Commonwealth will be immune from a state Act that is inconsistent with a federal Act.

5.300 In practice, s 109 has been construed more narrowly than the constitutional immunity of the Commonwealth pursuant to s 61. Where both defences are raised, s 109 rarely invalidates the state law. In *Uther v Federal Commissioner of Taxation*, the High Court recognised the Commonwealth's ability to enact legislation which would invalidate the *Companies Act 1936 (NSW)* by way of inconsistency,<sup>531</sup> and so prevent it from rebutting the Commonwealth's priority over debt. However, only McTiernan J in the minority found that the New South Wales legislation was invalidated by way of s 109.<sup>532</sup> Dixon J placed little relevance on s 109, stating that 'as I am of opinion that the state law cannot affect the prerogative rights of the Crown in right of the Commonwealth...it is unnecessary to pursue the question what is the operation of s 109'.<sup>533</sup>

528 I Mescher 'Wither Commonwealth immunity?' (1998) 17(1) *Australian Bar Review* 214.

529 T Blackshield *Australian constitutional law and theory* 2<sup>nd</sup> ed Federation Press Melbourne 1998, 301-331, 302.

530 In the absence of such an express intention in the legislation to this effect, the court will look at a variety of factors, such as the subject matter of the law and whether for the law to achieve its purpose it is necessary that it be a complete statement of the law on that topic. See *Viskauskas v Niland* (1983) 153 CLR 280. Section 109 is directed only at inconsistency between 'a law of a State' and 'a law of the Commonwealth'. In the ACT, legislation replicates the effect of s 109: See s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). Although the *Northern Territory (Self-Government) Act 1988* (Cth) is silent on the issue, NT legislation also gives way to conflicting Commonwealth legislation: see *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 90 ALR 59; *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582, 301.

531 In *Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 521 (Latham J).

532 id, 536 (McTierney J).

533 id, 532 (Dixon J).



5.301 In *Henderson*, the Defence Housing Authority (the ‘Authority’) submitted that the *Residential Tenancies Act 1987* (NSW) was inconsistent with the *Defence Housing Authority Act 1987* (Cth) (the ‘DHAA’) as the DHAA provides a comprehensive and exclusive code regulating the means by which the Authority is required to perform its function of providing adequate and suitable housing in order to meet the operational needs of the Defence Force and the requirements of Departments throughout Australia. However, the majority of the High Court held that s 109 had no application in this case. The Court concluded that the statutory authority conferred by the DHAA did not sanction non compliance with the state Act,<sup>534</sup> and clearly contemplated regulation by relevant state residential tenancies Acts. Thus, s 109 did not come into play, as the DHAA ‘does not intend to be exhaustive or exclusive in relation to the means by which the DHA’s function is to be performed’ and ‘is dependent for its practical operation upon state law’.<sup>535</sup>

5.302 The majority emphasised that s 109 was not intended to oust state laws of general application, which happened to cover the same subject matter as a Commonwealth Act, which itself ‘is predicated upon the existence of common law and statute law within a State’. The Court cited the decision of Dixon J in *Stock Motor Ploughs Ltd v Forsyth*.<sup>536</sup>

When from the general body of the law rules governing a special kind of instrument were selected for formulation in a statutory shape, it was inevitable that what was stated should, not only for its proper understanding but for its practical application, continue to depend upon the whole content of the law of which it formed a coherent part. The subject could not be isolated.<sup>537</sup>

5.303 In *Henderson*, therefore, a majority of the High Court considered s 61 of the Constitution to be the key provision in respect of the validity of a state Act in this context. Section 109 should have a narrow application, and not give the Commonwealth protection from state laws in the manner submitted by the Commonwealth. Arguably, the majority approach gives the Commonwealth greater power than necessary in its relationship with the states, by placing greater emphasis on the immunities doctrine.<sup>538</sup> In the minority on this issue, McHugh<sup>539</sup> and Gummow JJ<sup>540</sup> considered that s 61 was not the source of executive power in this

534 id, 428 (Brennan J).

535 id, 433 (Dawson, Toohey, Gaudron JJ).

536 (1932) 48 CLR 128, 137. See also *Clarke v Kerr* (1955) 94 CLR 489; *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 246; *Dobinson v Crabb* (1990) 170 CLR 218, 231.

537 *Re The Residential Tenancies Tribunal of NSW and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410, 433 (Dawson, Toohey, Gaudron JJ).

538 M Gladman ‘Re The Residential Tenancies Tribunal of NSW and Henderson; ex parte Defence Housing Authority (1997) 190 CLR 410: States’ power to bind the Commonwealth’ (1999) 27 *Federal Law Review* 151, 160.

539 *Re The Residential Tenancies Tribunal of NSW and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh).

540 id, 469 (Gummow J).

case and thus that s 109 was the sole constitutional barrier to the operation of the state Act. That is, their Honours held that, where the executive power arises from federal statute, the Commonwealth's protection from state law must come from s 109 of the Constitution as 'the *Cigamatic* doctrine has no application to legal rights which are the immediate product of federal statute and so protected by s 109 of the Constitution'.<sup>541</sup> As McHugh J put it

Where the federal Parliament legislates in respect of executive power...the protection of the Commonwealth from State laws is to be found in s 109 of the Constitution, not in the *Cigamatic* doctrine. To so hold is simply to apply the basic constitutional principle...that, when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament.<sup>542</sup>

**Question 5.52.** By virtue of s 109 of the Constitution, can a statutory provision of general application, which provides that the Commonwealth not to be bound by state legislation, automatically prevent a state Act from binding the Commonwealth? Alternatively, may such a provision be found to be inconsistent only on a case by case basis in respect of particular state legislative provisions?

**Question 5.53.** To what extent may provisions in particular Commonwealth Acts, which provide that the Commonwealth is not to be bound by state legislation, invalidate, by virtue of s 109, state legislation which generally regulates a Commonwealth activity empowered by such Commonwealth Acts?

## Immunity from execution

### Introduction and history

5.304 Execution is a procedure for the enforcement of judgments, which usually consists of the seizure and sale by the sheriff (or other court official) of the judgment debtor's property. The proceeds of sale are used by the sheriff to pay the sum due to the judgment creditor.<sup>543</sup> There are other writs of execution, adapted for particular purposes, for example, writs of possession (seizure of land), delivery (seizure of goods) and sequestration (seizure of rents and profits).<sup>544</sup>

<sup>541</sup> id, 470 (Gummow J).

<sup>542</sup> id, 459 (McHugh J).

<sup>543</sup> P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 47.

<sup>544</sup> id, 47.

5.305 The most common form of execution is in respect of a judgment for money or real or personal property, in which case a writ to bind the debtor's property requires no formal demand. In addition to the seizure and sale of property, the creditor may apply to the court for an attachment or garnishee order. This may occur where a third party owes a debt to the judgment debtor. Such debts may include money held in a bank account, or wages payable by an employer, and a garnishee order places the third party under a duty to pay the debt directly to the judgment creditor. This may not include future debts or money held in trust, unless such future payment may be characterised as a present right.

5.306 Execution may also apply to a judgment for performance or non-performance of an act. Enforcement of such judgments requires an 'indorsement' that in default the party liable may suffer execution to compel obedience. It also states the time for complying with the judgment, in default of which may result in sequestration or attachment of the debtor's property or even the debtor themselves.<sup>545</sup>

5.307 From the time when the first money judgments were awarded against the Crown in the United Kingdom, as early as the 13<sup>th</sup> Century, the Crown was immune from execution at common law.<sup>546</sup> In colonial Australia, the 1866 Queensland and 1876 New South Wales crown proceedings acts were initially denied royal assent because, in their attempt to equate claims against the Crown with claims between 'subject and subject,' they permitted execution against Imperial property in the event of unsatisfied judgments. These provisions were amended to confirm the traditional immunity of the Crown from execution, and the Acts were assented to.<sup>547</sup> Following federation, the immunity was subsequently expressed in s 65 JA,<sup>548</sup> which states

s 65: No execution or attachment, or process in the nature thereof, shall be issued against the property or revenues of the Commonwealth or a State in any such suit; but when any judgment is given against the Commonwealth or a State, the Registrar or other appropriate officer shall give to the party in whose favour the judgment is given a certificate in the form of the Schedule, or to a like effect.

5.308 Statutory immunity from execution is coupled, however, with a duty on the Crown to pay a judgment debt. The *Judiciary Act* states in s 66

s 66: On receipt of the certificate of a judgment against the Commonwealth or a State the Minister for Finance or the Treasurer of the State as the case may be shall satisfy the judgment out of moneys legally available.

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545 B Cairns *Australian civil procedure* 4<sup>th</sup> ed LBC North Ryde 1996 ch 21.

546 Chitty *Prerogatives of the Crown* Butterworths London 1820, 376; *R v Central Railway Signal* [1933] SCR 555. This immunity extended to all the writs of execution.

547 P Finn 'Claims against the government' *Law and government in colonial Australia* OUP Melbourne 1987, 144.

548 Similarly in the UK *Crown Proceedings Act* (1947).

5.309 In the great majority of cases, therefore, enforcing a judgment against the Commonwealth is quite straightforward. A judgment creditor obtains a certificate of judgment from the Court, presents it to the Treasury, and is paid. The position is the same for judgments against the states and it is generally provided that payment is to be made out of funds that have been appropriated for the purpose.<sup>549</sup>

5.310 Section 65 JA appears to refer back to s 64, in so far as it applies 'in any such suit'. The scarcity of case law on s 65 makes interpretation difficult, but it appears that its meaning in this context is generally regarded as being the same as that of s 64. That is, the 'suits' referred to are those in which the Commonwealth or a state is a party. All suits in which the Commonwealth is a party are necessarily matters of federal jurisdiction by virtue of s 75(iii) of the Constitution, but only some matters in which a state is a party fall into that category. However, the context of s 64 has been interpreted to limit that section to suits involving the exercise of federal judicial power, and thus it applies only to suits in federal jurisdiction. The same may be said of s 65.<sup>550</sup>

5.311 Presumably, therefore, the state Crown Proceedings Acts apply only to claims against a state Crown which are not within federal jurisdiction.<sup>551</sup> In the event of any inconsistency with the state law, s 65 would prevail by virtue of s 109 of the Constitution. While the immunity of states from execution of judgments in state matters is not of concern to this inquiry, such immunity of territories is of concern. As discussed below in Chapter 7, the immunity of the Northern Territory from execution is set out in s 67 JA, as well as in the *Crown Proceedings Act 1993* (NT).

5.312 The line of precedent supporting the rule against execution is long and unwavering. As the Canadian Law Reform Commission put it, 'if public authorities have been more or less forced to adapt to a scheme of partial liability, the same cannot be said with respect to compulsory execution, where courts have rejected any liberalisation of the rule'.<sup>552</sup> Indeed, there is substantial Canadian case law regarding execution.<sup>553</sup> Cases in which the immunity has been firmly endorsed involve attempts to seize and sell a ferry boat owned by the Crown,<sup>554</sup> fortifications

549 *Claims Against the Commonwealth Act 1902* (Cth) s 66; *Crown Proceedings Act 1988* (NSW) s 7; *Crown Proceedings Act 1980* (Qld) s 11; *Crown Proceedings Act 1993* (Tas) s 11; *Crown Proceedings Act 1992* (ACT) s 13; *Crown Proceedings Act 1993* (NT) s 11; *Crown Proceedings Act 1992* (SA) s 10; *Crown Proceedings Act 1958* (Vic) s 26; *Crown Suits Act 1947* (WA) s 10.

550 See *Maguire v Simpson* (1977) 139 CLR 362, 370 (Barwick CJ); *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 224 (Stephen J). Note that execution is a procedural rather than substantive right. Consequently, the controversy regarding the power of s 78 of the Constitution to create substantive rights does not impact on the operation of s 65 JA.

551 As with s 64, the state crown proceedings acts all contain provisions similar to s 65 JA.

552 Law Reform Commission of Canada *Immunity from Execution* LRC Ottawa 1987, 18.

553 id, 14, 74, 84–85.

554 *Young v SS 'Scotia'* [1903] AC 505 (P C Can).

constructed for the Crown under contract,<sup>555</sup> the assets of the National Chemical Works,<sup>556</sup> and the assets of the Canadian Broadcasting Association.<sup>557</sup>

**Question 5.54.** In what circumstances, if any does the immunity from execution in s 65 of the *Judiciary Act* apply to matters not in federal jurisdiction? In particular, to what degree does s 65 apply to the states, and to what degree does it override state legislation with respect to execution? Should the *Judiciary Act* be amended to clarify this position?

## Enforcement under the *Judiciary Act* and related state Acts

### *Enforcement provisions*

5.313 Typically, the Crown's immunity from execution is now expressed in statutory form. As with the Commonwealth, in most state and territory jurisdictions, it is expressly provided that no execution or similar process shall be issued out of any court against the Crown.<sup>558</sup> There are similar provisions in the crown proceedings statutes of the United Kingdom,<sup>559</sup> Canada and each of the ten provinces,<sup>560</sup> and New Zealand.<sup>561</sup> The only exception is Queensland, where execution is expressly permitted 'on any property vested in Her Majesty in right of the State of Queensland' excepting only the property occupied by the Governor, the legislative buildings, court houses and prisons.<sup>562</sup> It has been argued that these exceptions, while prudent, are unlikely to exhaust the categories of Crown property that should be exempt from private seizure and sale.<sup>563</sup>

5.314 As mentioned above, however, the provisions that provide the Crown's immunity from execution operate in conjunction with provisions that obligate the Crown to pay its judgment debts. Such enforcement provisions are essential to a

555 *Fitts v Pilon* (1868) 12 LCJ 289.

556 *R v Central Railway Signal* [1933] SCR 555, 563.

557 *Public Service Alliance of Canada v CBC* [1976] 2 FC 145.

558 s 65 JA; *Crown Proceedings Act 1992* (SA) s 8; *Supreme Court Civil Procedure Act 1932* (Tas) s 67; *Crown Proceedings Act 1958* (Vic) s 26, *Crown Suits Act 1947* (WA) s 10. Note that neither s 67 JA, nor the *Crown Proceedings Act 1993* (NT), which immunise the Northern Territory from execution, are coupled with a provision requiring payment of a judgment debt.

559 *Crown Proceedings Act 1947* (UK) s 25.

560 *Crown Liability Act 1970* (RSC) C-38. See P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 48 note 6.

561 *Crown Proceedings Act 1950* (NZ) s 24.

562 *Crown Proceedings Act 1980* (Qld) s 11(2) In NSW, the *Claims Against the Government and Suits Act 1912* (NSW) s11, permitted execution against 'any property vested in the Government', making an exception only for property in which the Imperial Government had an interest. The *Crown Proceedings Act 1988* (NSW) s 7, however, states that execution, attachment or any similar process shall not be issued out of any court against the Crown or any property of the Crown.

563 P Hogg *Liability of the Crown* 2<sup>nd</sup> ed LBC Ltd North Ryde 1989, 51.

policy that favours the continued existence of the immunity. Similarly to s 66 JA, the Crown Proceedings Act 1947 (UK) and those of Canada and each of its ten provinces make the provision for the payment of judgment debts. The mandatory nature of the language of the statutes imposes a duty on the Treasurer to pay all judgment debts.<sup>564</sup>

### *Avoidance provisions and the appropriation rule*

5.315 The Crown's liability to pay damages may of course be affected by legislation. This can be done before the fact by denying or capping the Crown's liability for a particular kind of damage, or it may be done after the fact by retroactively reversing or modifying a judgment awarded against the Crown.<sup>565</sup> Rather than a means of avoiding a judgment debt exercisable by the executive, however, this is an action of the legislature, which removes the underlying liability of the executive, upon which the judgment rests. The courts have the power to quash legislation that seeks to overturn a judicial decision in a manner prohibited by the Constitution but, conversely, the legislature has some power to overrule the effect of judicial decisions by legislation, both for existing and future litigation. These circumstances raise highly controversial issues regarding the separation of powers in Chapter III of the Constitution. As Winterton has noted,

One of the most fertile areas of dispute, both in Australia and the United States, has been the uncertain boundary between, on the one hand, Parliament's undoubted power to regulate rights and obligations on subjects within its legislative power, including those currently the subject of litigation, and, on the other hand, the need to protect the federal judicial process from legislative interference.<sup>566</sup>

5.316 Chapter III contains no prohibition that rights in issue in legal proceedings shall not be the subject of legislative action. However, legislation may not contravene s 71 of the Constitution by interfering with the judicial process itself. Nor may it be directed solely at a successful litigant and thus constitute a 'Bill of Pains and Penalties' — a statutory provision that imposes a penalty on a particular individual in the absence of judicial determination to that effect.<sup>567</sup> A way of characterizing the s 71 prohibition is to say that the legislature may *overrule* a decision, both prospectively and retrospectively, but may not *reverse* it.<sup>568</sup> That is, legislation may change the law to make a decision unenforceable or to ensure that future decisions on the issue must be different, but it may not alter a decision that has already been made.

<sup>564</sup> id, 49.

<sup>565</sup> id, 50; Ontario Law Reform Commission *Report on the liability of the Crown* OLRC Toronto 1989, 85.

<sup>566</sup> G Winterton 'The separation of judicial power as an implied bill of rights' in G Lindell (ed) *Future directions in Australian Constitutional Law* Federation Press Canberra 1994, 194.

<sup>567</sup> eg *Kable v The Director of Public Prosecutions for New South Wales* (1997) 189 CLR 51.

<sup>568</sup> J Quick & R Garran *The Annotated Constitution of the Australian Commonwealth* Angus & Robertson Sydney 1901, 722.

5.317 The relevant principle with respect to this issue, was developed in *R v Humby; ex parte Rooney*<sup>569</sup> and confirmed by the High Court in the *BLF case*.<sup>570</sup> In the *BLF case*, legislation that deregistered the Builders Labourers' Federation did not interfere with the judicial process regarding deregistration, and was not characterised as a Bill of Pains and Penalties, as 'it [did] not deal with the judicial process', but simply made 'redundant the legal proceedings which [the Builders Labourers' Federation] commenced in this Court'.<sup>571</sup>

5.318 The Privy Council has noted the difficulty in drawing the line between legislation that interferes with the judicial process and that which does not. In *Liyanage v R*<sup>572</sup> legislation that retrospectively legalised the detention of criminal suspects, altered relevant laws of evidence and the penalties on conviction, was found to be invalidly interfering with judicial process and 'a grave and deliberate incursion into the judicial sphere'.<sup>573</sup> In other words, legislation that directs the court as to the manner in which it should decide a case is invalid.<sup>574</sup> In respect of a money judgment against the Commonwealth, however, the leading cases appear to leave open the possibility of the legislature enacting a provision extinguishing the cause of action upon which a judgment is made.

5.319 This being said, courts have rarely questioned the principle of immunity from execution, and decisions generally reinforce the principle. This, combined with the fact that governments rarely refuse to comply with a judgment, means that there is little case law on the subject.<sup>575</sup> In Australia, because of the clear duty of the Commonwealth to pay judgments debts under s 66 JA, neither the immunity from execution in s 65, nor the appropriation rule in s 83 of the Constitution, have been a notable source of controversy or litigation.

5.320 Section 83 of the Constitution states 'No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law...'. Appropriations can be specific or general, to the extent that, for example, an advance of funds can be made to the Treasurer to meet unforeseen expenditure in excess of a specific appropriation. Most importantly s 83 has been interpreted as

569 (1973) 129 CLR 231, 250 (Mason J).

570 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96 (Mason, Gibbs, Brennan, Deane, Dawson JJ).

571 id, 96–97.

572 [1967] 1 AC 259.

573 *Liyanage v R* [1967] 1 AC 259, 290.

574 G Winterton 'The separation of judicial power as an implied bill of rights' in G Lindell (ed) *Future directions in Australian Constitutional Law* Federation Press Canberra 1994, 204.

575 One consequence of Crown immunity in respect of judgment debts which does occasionally feature in case law, is where a creditor attempts execution by way of attachment of a debt owed by the Crown to the judgment debtor. This, of course, is quite different from a situation where the Crown is the judgment debtor. Nevertheless, it is only where a Crown entity does not benefit from the shield of the Crown that it is liable in garnishee proceedings B Cairns *Australian civil procedure* 4<sup>th</sup> ed LBC 1996, ch 2, 700–701, see *WA Purvis Stores Pty Ltd v Richardson; Country Roads Board (Garnishee)* [1941] VLR 56.

requiring that disbursement of money from the Treasury be pursuant to an Act of Parliament.<sup>576</sup>

5.321 As the High Court described it in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*

That section expresses the principle that parliamentary authority is required for the expenditure of any moneys by the Crown. The reference to ‘the Treasury of the Commonwealth’ extends to any fund or sum of money standing to the credit of the Crown in right of the Commonwealth.<sup>577</sup>

5.322 In *Mewett*’s case, Gummow and Kirby JJ commented, in respect of this principle, that

Sections 65 and 66 of the *Judiciary Act* accommodate this principle in respect of judgments given against the Commonwealth and States. There is to be no execution or attachment, but upon receipt of a certificate of judgment, the Commonwealth Minister for Finance or State Treasurer, as appropriate, shall satisfy the judgment out of moneys legally available.<sup>578</sup>

5.323 It is not clear whether s 66 JA can, of its own force, authorise an appropriation required to satisfy s 83 of the Constitution. However, such authority seems all but automatic in respect of judgments to which s 66 JA applies. In addition, there are limitations on the operation of the s 83 prohibition, which have been emphasised by the High Court in a number of cases.

5.324 In *Vass v Commonwealth*<sup>579</sup> an issue was whether the Commonwealth could validly enter into a contract which incurred a debt on the Commonwealth, unless funds to pay the debt were first appropriated by Parliament. The issue was not determinative in the case, as the Commonwealth conceded that a failure to appropriate was not a defence to a contract claim. The Federal Court commented that this rule was clearly established in *New South Wales v Bardolph*, in which Dixon J held that the prior provision of funds by Parliament is not a condition precedent to the obligations of the contract.<sup>580</sup> The Court in *Vass* further cited Dixon J’s comments in *Bardolph*, that

[i]t would defeat the very object of such provisions as those contained in the *Judiciary Act*, if, before the Courts could pass upon the validity in other respects of the subject’s claim against the Crown, it were necessary that Parliament should vote the moneys to satisfy it... It would be strange if liability to suit upon contract was dependent upon

576 R Lumb & G Moens *The Constitution of the Commonwealth of Australia* 5<sup>th</sup> ed Butterworths Sydney 1986, para 296.

577 (1993) 176 CLR 555, 572–573 (Mason CJ, Deane, Toohey And Gaudron JJ).

578 *Commonwealth v Mewett* (1997) 191 CLR 471, (Gummow, Kirby JJ).

579 (2000) 169 ALR 486.

580 *Vass v Commonwealth* (2000) 169 ALR 486, citing *New South Wales v Bardolph* (1934) 52 CLR 455, 510.



the antecedent fulfillment of the condition that moneys have been made available to satisfy the claim.<sup>581</sup>

5.325 In making this pronouncement, Dixon J relied on the Privy Council decision in *Churchward's* case.<sup>582</sup> The state equivalent to s 66 JA was held not to be overridden by a lack of appropriation and the comment was made that 'it would be quite extraordinary if the government decided to defy a court order on this basis'.<sup>583</sup>

**Question 5.55.** Is s 66 of the *Judiciary Act* effective as a statutory authorisation which satisfies the requirements of s 83 of the Constitution, without the need for Parliament to additionally authorise the appropriation of funds to pay a judgment debt? If not, is it possible or desirable to amend s 66 to this effect?

**Question 5.56.** Should s 66 be amended to specify precisely which revenue fund judgment debts are to be paid from?

### Comparative reforms

5.326 Unlike Australia, Canadian legislative provisions similar to sections 65 JA and 66 JA are controversial, and the Crown's immunity from execution has produced strident criticism. In 1987, the Canada Law Reform Commission conducted an inquiry into this issue. The inquiry was prompted by concerns that the Crown was using tactics of avoidance and delay to prevent the enforcement of judgments against it, and exploiting its immunity from execution. Consequently, the increasing recognition of the rights of citizens in litigation against the Crown was being circumvented. The report recommended that 'all state property should be subject to compulsory execution'.

5.327 However, this position is qualified by a suggestion that 'some exceptions might be expressly enumerated by statute', and also that the Court have the power to exempt property if the Crown can establish 'that the property in question is essential to the organization and operation of the public service'.<sup>584</sup> Hogg argues that a right to execution that is qualified in this way is of little real value, and that a judgment debt owed by the Crown is sufficiently secure that execution is unnecessary.<sup>585</sup> Nonetheless, the Canadian report is the only recent comprehensive

581 *New South Wales v Bardolph* (1934) 52 CLR 455, 510 (Dixon J).

582 (1865) LR 1 QB 173.

583 N Seddon *Government contracts: Federal, state and local* Federation Press Sydney 1995, 89–90.

584 Law Reform Commission of Canada *Immunity from Execution* LRC Ottawa 1987, 74, 84–85.

585 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 51.

critique of crown immunity from execution. In respect of the current law in Canada, similar to the law in most of Australia in this respect, the report identifies many problems and issues. The report maintains that, despite the duties imposed by statute, the government has many means which allow it to avoid compliance with a judgment debt.

5.328 At the outset, the Canadian study makes the point that non compliance by a government with administrative law decisions is different from non compliance in a private law context. Where it is subject to a judgment debt, government is in a position to ‘unilaterally shape’ the legal regime in individual cases in such a way as to alter either the underlying facts or law to effectively extinguish the liability which underlies it, and ‘consequently, compliance in administrative law is a complicated and diffuse phenomenon’.<sup>586</sup> The Canadian study concludes that the major problems with the present regime stem from the fact that

There is no clear and specific obligation on the Crown to execute fully judicial decisions. Where there is inertia or bad will on the part of public authorities, the execution creditor has only feeble techniques to obtain execution of a judgment in his favour.<sup>587</sup>

5.329 In the context of its general recommendation for compulsory execution against the Crown, the Canada Law Reform Commission recommended that execution be strictly regulated by limiting the number of instalment payments in satisfaction of a debt,<sup>588</sup> requiring the government to justify any public interest concerns to the Court within a time limit,<sup>589</sup> and imposing monetary penalties on the government for refused, delayed or incomplete compliance.<sup>590</sup>

5.330 Another source of comparative law regarding immunity from execution may be found in the foreign states immunities legislation in Australia<sup>591</sup> and many overseas jurisdictions. The majority of these Acts take a relaxed approach to immunity from execution and one which recognizes the different nature of various forms of state property. As discussed below in paragraphs 5.343–5.344, such legislation generally includes a provision which rebuts the presumption of immunity in respect of commercial property.

5.331 The foreign states immunity regime provides a powerful example of the viability of a revised notion of intra national immunity from execution in the modern era of government, particularly as there is in fact more need for caution when executing judgments in an international environment than there is in a

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586 Law Reform Commission of Canada *Immunity from Execution* LRC Ottawa 1987, 19.

587 id, 44.

588 id, 83.

589 id, 85.

590 id, 87.

591 *Foreign States Immunities Act 1985* (Cth), s 32.

domestic environment. For example, in its 1984 report on foreign state immunity, the Commission noted that, even if immunity from jurisdiction were relaxed in respect of foreign states, immunity from execution may not correspondingly be relaxed, as it is 'generally accepted that states do not take coercive action against each other or their property'.<sup>592</sup> The Commission concluded, however, that some degree of execution should be permitted against foreign states. This was in line with the international trends in this regard. These recognised the need to balance two basic considerations: on the one hand, the 'risk to diplomatic and economic relations in allowing execution'; and on the other hand, the interest 'in ensuring that judgment creditors can obtain satisfaction by executing against at least some types of foreign state property'.<sup>593</sup> Given that such risk does not exist in the domestic climate, there appears no impediment to a similar approach to execution against the commercial property of the state and Commonwealth Crowns.

### **Arguments for retaining immunity**

5.332 The Canadian study discussed a number of arguments that have been raised over the years to support crown immunity from execution. While some arguments adopt a practical approach, underlying them is the same reluctance to make a coercive order against the Crown that led to the historical immunities of the Crown from mandamus, injunction, specific performance and discovery.<sup>594</sup> Like the other forms of crown immunity, there is a degree to which courts have maintained this privilege out of adherence to a tradition that might be seen as outdated in the context of modern government. Briefly, the main arguments for retaining the immunity from execution are as follows.

5.333 First, the seizure of Crown property might cause intolerable interruptions in public services.<sup>595</sup> The assets of the Crown are, by their very nature, the assets of the people. They include the military hardware of the defence force, public transport, power stations, libraries and sporting grounds. The sale of these assets to meet a judgment debt would be felt ultimately by the people for whom the service or facility is provided.

5.334 Second, there is the pragmatic argument that execution against the Crown is unnecessary because the Crown does in fact satisfy its judgment debts.<sup>596</sup> Judgments against the Crown are met not from an individual's resources but from the deep pockets of government. Accordingly, there is little incentive to default.

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592 Australian Law Reform Commission *Foreign state immunity* ALRC 24 AGPS Canberra 1984, 73, citing United Kingdom 388 *Parl Debs (H of L)* (17 Jan 1983) col 76 (Lord Chancellor).

593 Australian Law Reform Commission *Foreign state immunity* ALRC 24 AGPS Canberra 1984, 74.

594 P Hogg *Liability of the Crown* 2<sup>nd</sup> ed LBC Ltd North Ryde 1989, 54.

595 Law Reform Commission of Canada *The legal status of the federal administration* LRC Ottawa 1985, 76.

596 *Franklin v The Queen* (No 2) [1974] 1 QB 205, 218 (CA).

5.335 Third, while an individual or corporate judgment debtor may be able to move assets out of the jurisdiction so as to defeat enforcement, this is not possible in respect of most assets of the Crown. Thus there will always be within the jurisdiction a pool of crown assets from which a judgment can be satisfied. Moreover, a public official who refuses to pay a judgment debt may be compelled to do so through appropriate administrative law remedies.

5.336 A final argument for retaining the immunity arises from legal impediments to accessing the revenue of the Crown. Because the executive arm of government cannot appropriate state revenue without parliamentary authorisation, it cannot comply with a judgment directing payment without having first sought and obtained legislative authorisation. The Canadian Law Reform Commission has argued that 'whatever the situation where the Crown is debtor of a money judgment, the budgetary authorisation rule can become a real obstacle when the administration is ordered to perform a specific act'.<sup>597</sup>

**Question 5.57.** Should the *Judiciary Act* be amended to provide that a judgment creditor may seek a writ of mandamus against the federal Treasurer, or other appropriate Commonwealth officer, in the event that the Treasurer does not comply with s 66 of the *Judiciary Act*? Alternatively, is such a right satisfactorily provided for by s 75(v) of the Constitution?

### Arguments for modifying or removing immunity

5.337 The Commission has no evidence to suggest that any Commonwealth, state or territory government creates difficulties for its judgment creditors who seek to enforce their rights under a judgment. However, there are a number of tactics by which a government can resist a judgment debt. In particular, governments may resort to very effective tactics of 'passive' resistance. In some overseas jurisdictions such tactics are common and are a source of great controversy. While no such controversy exists in Australia at present, the maintenance of a blanket crown immunity from execution is at odds with the status of the law in respect of other specific forms of immunity, and with prevailing views regarding crown immunity generally.<sup>598</sup>

<sup>597</sup> Law Reform Commission of Canada *Immunity from Execution* LRC Ottawa 1987, 12.

<sup>598</sup> While overt resistance to payment of judgment debts does sometimes occur (particularly in France where defiance of the courts by the central authorities is more commonplace than in other western countries) separation of powers generally gives the courts the ultimate sway. The courts may quash any act that directly violates the substance of the first judgment, and severely limit non-complying behaviour: Law Reform Commission of Canada *Immunity from execution* LRC Ottawa 1987, 23.

5.338 Like any judgment debtor, the government may delay compliance with a judgment, either by appealing the decision, or simply by procrastinating. However, unlike most other debtors, the massive resources of government and the size and complexity of the administration significantly aid such procrastination. The government may similarly avoid executing a judgment fully by making small and/or disparate part payments of the debt. As the Canada Law Reform Commission put it, the minister may ‘invoke accounting requirements to postpone payment to another fiscal year’, or ‘make a series of instalment payments so as not to exceed the limits of various budgets’.<sup>599</sup> Again, the resources of government allow it to force a judgment creditor to engage in further litigation or negotiations to obtain complete execution of a judgment. The government may also use more sophisticated techniques to neutralise a judgment or prevent it having any real effect. In some jurisdictions, such as France and Canada, ‘legislative ratification’ is frequently used. The legislature can enact retrospective legislation to regularise dubious or contested acts as at the date when they were performed. In addition, the administration may rectify an illegality in a decision and effectively remake it, to the detriment of the applicant. The administration may also fundamentally change the circumstances related to a judgment so as to make the judgment ineffectual, or make it impossible to comply with due to resulting public interest conflict.<sup>600</sup>

5.339 As discussed in paragraphs 5.320–5.325, the rule that government monies cannot be paid out unless first authorised by Parliament provides an ideal mechanism for those governments who wish to delay payment of a judgment debt without illegality. Again, however, the Commission has no evidence that the federal government exploits s 83 of the Constitution in this way.

### **The position of commercial property**

5.340 As discussed in detail above, one of the fundamental arguments against crown immunity generally is that governments are increasingly operating as commercial entities and competing in the marketplace with ordinary citizens or corporations. The large number of commercial ventures in which modern governments engage results in many circumstances of conflict between the government and private interests, and the need to maintain a level playing field in such circumstances is now widely recognised. The power of an entity in the marketplace is often reflected in its assets. Compliance with legal obligations by a corporation is often guaranteed by the ability of the party relying on such obligations to enforce them against the assets of the corporation. In the context of execution, it may be argued that assets of government should in most cases be subject to attachment or liquidation to the same degree as those of its business competitors. It is rare that execution against such assets would be contrary to the public interest.

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599 id, 12.

600 id, 29.

5.341 In its study,<sup>601</sup> the Canada Law Reform Commission identified a distinction between industrial or commercial activities of governments and purely administrative activities. The Canadian Law Reform Commission reiterated the importance of such a distinction in this context, and stated that

For these reasons, we propose that federal authorities, especially the Government and the Administration, no longer enjoy immunity from execution for their industrial and commercial activities. As for administrative activities that are closer to the traditional conception of *jure imperii* (benefit-granting function, planning function, regulatory function, police and control function, and so forth) immunity should remain the rule in order to protect the public interest.<sup>602</sup>

5.342 It is thus arguable that a distinction should be made between commercial assets and those that ought to be immune from seizure and sale, such as property used in the context of military activity, or for the functions of the parliament.<sup>603</sup> The Canadian report describes criteria for drawing the distinction between commercial and public activities. These include: whether the legislative intent behind the governmental entity to whose assets the judgment debt attaches is profit oriented, whether the activities of such entity achieve financial gain, whether the entity is involved in commercial transactions, and whether the entity serves the community in its functions, or purely the ‘private interests’ of the Crown. For example, the postal service, which is involved in commercial operations, provides a service to the community and is profitable for sound administrative reasons. Consequently, its assets may not reasonably be regarded as commercial and subject to execution. Alternatively, the State Lottery does not provide such a service and may not claim such immunity.<sup>604</sup>

5.343 In Australia, the *Foreign States Immunities Act 1985* (Cth) (‘FSIA’) makes a clear distinction between commercial and public government property, and may provide a model as to an appropriate amendment to s 65 JA. The FSIA states in s 30 that the property of a foreign state is not subject to an order for execution in respect of the judgment of an Australian court, but goes on to provide exceptions. In particular, the FSIA provides:

32. (1) Subject to the operation of any submission that is effective by reason of section 10,<sup>605</sup> section 30 does not apply in relation to commercial property.

(2) Where a foreign State is not immune in a proceeding against or in connection with a ship or cargo, section 30 does not prevent the arrest, detention or sale of the ship or cargo if, at the time of the arrest or detention:

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601 id, 54.

602 id, 66.

603 id, 86.

604 id, 67.

605 ie where a foreign state submits to jurisdiction.

- (a) the ship or cargo was commercial property; and
  - (b) in the case of a cargo that was then being carried by a ship belonging to the same or to some other foreign State, the ship was commercial property.
- (3) For the purposes of this section:
- (a) commercial property is property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes; and
  - (b) property that is apparently vacant or apparently not in use shall be taken to be used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.

5.344 The public/commercial distinction in respect of execution against government assets is also clearly recognised in many overseas jurisdictions in their legislation regarding judgments against foreign polities, and is regarded as necessary to meet the requirements of the contemporary business world. The Canadian<sup>606</sup> and United Kingdom<sup>607</sup> state immunity legislation, and the United States Foreign Sovereign Immunities Act.<sup>608</sup> Each provides that the property of foreign states involved in commercial activities does not enjoy immunity from execution.

**Question 5.58.** Is non compliance with judgments by the Commonwealth a significant problem for judgment creditors in Australia? Does the Commonwealth government employ techniques similar to those identified by the Canadian Law Reform Commission?

**Question 5.59.** Should the Commonwealth's immunity from execution be removed by repeal of s 65 of the *Judiciary Act*?

**Question 5.60.** If the Commonwealth's immunity from execution is removed, should this be by reversal or abolition of the presumption? What exceptions should apply? Should these exceptions be set down in the *Judiciary Act*?

**Question 5.61.** Should compliance with judgments be regulated in legislation in the manner recommended by the Canadian Law Reform Commission?

606 State Immunity Act (Can) RSC 1985, c S-18 s 5, 11.

607 State Immunity Act 1978 (UK).

608 Foreign Sovereign Immunities Act 1976 (US).

**Question 5.62.** If not repealed, should s 65 of the *Judiciary Act* be amended to allow execution against commercial assets? Should such amendment reflect the relevant provisions of the *Foreign States Immunities Act 1985* (Cth)? Alternatively, should the *Judiciary Act* reflect the statutory regime in Queensland, or that recommended by the Canadian Law Reform Commission?

## Who is the Commonwealth?

What does 'the Crown' mean? 'The crown as an object is a piece of jewelled headgear under guard in the Tower of London. But it symbolizes the powers of government which were formerly wielded by the wearer of the crown'.<sup>609</sup>

### Introduction

5.345 The term 'Crown' is used to refer to executive governments in Australia. These governments have legal capacity, and enjoy the consequent rights and liabilities under common and statute law. In practical terms, 'the Crown in right of the Commonwealth' or 'the Crown in right of a state' refers to

the collection of individuals and institutions (ministers, public servants, a Cabinet, the Executive Council, a Governor or Governor-General, and statutory agencies) which exercise the executive functions of government. The law sees these individuals and institutions as agents of the Crown, and many executive functions as acts of the Crown.<sup>610</sup>

5.346 The Crown is, therefore, an abstraction - it can only carry out its activities through the agency of others. Whether a particular person or body is to be regarded as 'the Commonwealth' or 'the State', generally depends on two factors: is that person or body controlled and authorised, expressly or impliedly, to act as an agent of that manifestation of the Crown; and was the act in question within the ambit of such authority?

5.347 The means by which governments have carried out their functions through agents has fluctuated throughout history, as the role of government in society has changed. In the pre-federation days in Australia, following periods of massive industrialisation and expansion of the British Empire, governments became heavily involved in building the infrastructure of a rapidly developing society and in the more complex administration of such society. As discussed above in the context of Crown liability in tort and contract, as the numbers and level of activity of Crown

609 P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 9, quoting *Town Investments v Dept. of Environment* [1978] AC 359, 397 (HL).

610 P Hanks *Constitutional Law in Australia* 2<sup>nd</sup> ed Butterworths Sydney 1996, 160.



agents grew, there became correspondingly less justification for maintaining an inequality between such agents and ordinary citizens. Similarly, as discussed above in the context of the erosion of Commonwealth immunity from statute, corporate Commonwealth entities have grown considerably in diversity and number, and have become increasingly likely to engage in business activities in competition with private enterprise. Consequently, a further test which has developed, is whether the nature of the activities of the entity are purely commercial and thus ought not be clothed with special privileges when the entity deals in the marketplace.

### **Meaning of ‘the Commonwealth’ in the *Judiciary Act***

5.348 The term ‘the Commonwealth’ is used in a number of different contexts in the Constitution and the *Judiciary Act*, and this can produce a lack of clarity. For example there may be a difference in meaning between ‘the Commonwealth’,<sup>611</sup> an ‘officer of the Commonwealth’,<sup>612</sup> and ‘a person suing or being sued on behalf of the Commonwealth’.<sup>613</sup> More importantly, in the context of claims against the Commonwealth, s 78 of the Constitution empowers Parliament to make laws conferring rights to proceed ‘against the Commonwealth or a State’. The operation of s 78 authorising legislation that removes the immunities of the Commonwealth, does not automatically apply such legislation to all Commonwealth entities.

5.349 Consequently, an anomaly which complicates the issue of whether an entity attracts the privileges and immunities of the Commonwealth, is that when performing a particular function, an entity may not be the Commonwealth for the purpose of determining immunity, even though it is ‘the Commonwealth’ in the context of s 75(iii).<sup>614</sup> The latter question is one of constitutional interpretation and has been informed by the desire to avoid ‘colourable evasion’ of the High Court’s original jurisdiction in actions against the Commonwealth when governmental activities are undertaken by officers and agencies in substance forming part of or representing the Commonwealth.<sup>615</sup> The former question is essentially one of legislative intention, and hence susceptible to legislative regulation.

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611 Constitution s 75(iii), 78; s 64 JA.

612 Constitution s 75(v). Note, there is potential overlap between s 75(iii) and s 75(v) because of the breadth given to the interpretation of the former provision — for example, a Commissioner of Taxation may be subject to both paragraphs: *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

613 Constitution s 75 (iii); s 67A JA.

614 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334; *Maguire v Simpson* (1977) 139 CLR 362, 406; *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 458, 463–4.

615 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 367.

5.350 In *Henderson*, for example, Gummow J made the point that despite the wide construction which has been given to ‘the Commonwealth’ in s 75(iii) of the Constitution and s 64 JA a distinction has been drawn between an agent’s status as ‘Commonwealth’ for the purpose of being sued and such status for the purpose of benefiting from crown immunity.<sup>616</sup> Without elaborating further, but in this context, Gummow J went on to discuss *Maguire v Simpson*.<sup>617</sup> In this case, Jacobs J applied *Inglis* to find that the Commonwealth Trading Bank was ‘the Commonwealth,’ but went on to state that,

it does not follow that, because the Bank falls within the descriptions in s 75 (iii) and the description in s 78 of the Constitution, it is necessarily the Crown in right of the Commonwealth so that there is attracted to it any prerogative immunity of the Crown in respect of limitation of action. The latter subject matter and the subject matter of s 75(iii) are different. Section 75(iii) should be given a wide construction and effect...On the other hand the Crown prerogative does not generally extend as widely.<sup>618</sup>

5.351 The differences in language referred to above are replicated to a certain degree, though not completely, when the Constitution and the *Judiciary Act* refer to ‘the States’. The issue of ‘who is a State’ may also need to be addressed because of the power granted to Parliament by s 78 of the Constitution to confer rights to proceed ‘against the Commonwealth or a State’, and the exercise of that power by enactment of s 64 JA. It has been commented that, particularly in the case of a private corporation carrying out government functions, an entity may benefit from the ‘shield of the Crown’ in the right of the state if being sued, but not be ‘the State’ for the purposes, for example, of s 114 of the Constitution and its prohibition on taxing a state’s ownership of property.<sup>619</sup> In *Deputy Commissioner of Taxation v State Bank of NSW*,<sup>620</sup> the High Court held that ‘the legislature could explicitly endow a private corporation carrying on business for private purposes with the privileges and immunities of the Crown, yet that private corporation would not answer the description of ‘a state’ for constitutional purposes’.<sup>621</sup>

**Question 5.63.** Should the *Judiciary Act* reflect the full amplitude of the language used in Chapter III of the Constitution in so far as the *Judiciary Act* creates rights to proceed or generates substantive liability in actions against the Commonwealth?

616 *Re The Residential Tenancies Tribunal of NSW and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410, 465.

617 *Maguire v Simpson* (1977) 139 CLR 362, 406.

618 Similarly, in *Rural Bank v Hayes* (1951) 84 CLR 140, 146, the majority found that the Rural Bank of New South Wales was a body independent of the State government, with powers and discretions of its own to carry on general banking business..

619 B Horrigan *Government law and policy: Commercial aspects* Federation Press Sydney 1998, 292.

620 (1992) 174 CLR 219.

621 *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 230.

**Question 5.64.** In particular, should Part IX of the *Judiciary Act* (s 56–67) make it clear that the term ‘the Commonwealth’ includes persons suing or being sued on behalf of the Commonwealth, as is currently the case in relation to Part IXA (suits relating to the Northern Territory)?

**Question 5.65.** Should amendments be made to clarify the issue of who or what is a ‘State’ for the purpose of the *Judiciary Act*?

**Question 5.66.** For the purposes of extending crown immunity to agents, is the meaning of ‘State’ and ‘Commonwealth’ to be construed similarly in the Constitution and the *Judiciary Act*? Ought this be clarified by amendment to the *Judiciary Act* or the *Acts Interpretation Act 1901* (Cth)?

**Question 5.67.** If an entity has the status of the Commonwealth for the purpose of bringing a suit against it, does it attract all of the immunities of the Commonwealth, or is there a distinction between the Commonwealth and its agents in this respect?

## Types of Commonwealth entity

### *The growth and diversification of Commonwealth entities*

5.352 As a result of the changing nature of government agencies,<sup>622</sup> considerable complexity is added to the identification of ‘the Commonwealth’. Macroeconomic changes and sweeping tides of political will have seen historical drives towards nationalisation of industry, and closely held government ownership and operation of the major public utilities such as power, telecommunications and public transport. Government agency is often straightforward in such circumstances. However, recent governmental policy has seen the privatisation of these industries and an increasing tendency to contract out what were previously government activities to private entities.<sup>623</sup> The nexus between the Commonwealth and the entity in question can be far less clear in such cases.

5.353 The status of an entity as an emanation of the Crown in the right of the Commonwealth is further complicated by the vast range of entities that has grown up with the expansion and contraction of nationalised and privatised industries. As an overview, the types of entity which may attract the immunity of the Commonwealth include

<sup>622</sup> For discussion of the impact of this on issues of Crown immunity, see para 5.44, 5.209–5.211 and 5.283–5.285.

<sup>623</sup> See for example N Greiner ‘Propaganda, prejudice and protests – privatisation policy in the 1990s’ in B Collier & S Pitkin (eds) *Corporatisation and privatisation in Australia* CCH Aust Ltd Sydney 1999, 1.

- ?? employees
- ?? commissions
- ?? statutory authorities
- ?? statutory corporations
- ?? government business entities (GBEs)
- ?? government owned corporations (GOCs), and
- ?? private corporations under contract to the government.

5.354 In the first three categories, Commonwealth agency is generally set down clearly in legislation and is rarely in issue. Where such agency is not specified in statute, its existence is often relatively straightforward to ascertain, as the functions of such entities and their degree of control by government are easy to identify. It is in the latter three categories that the nexus between the entity and the Commonwealth is more complex, the existence and nature of control less clear, and the activities of the entity more likely to fluctuate between private and governmental in their character.

#### ***Commonwealth GBEs and GOCs***

5.355 On 12 May 1999, the Joint Committee of Public Accounts and Audit (JCPAA) resolved to conduct an inquiry into the corporate governance and accountability arrangements for Commonwealth GBEs. A report was published in December 1999.<sup>624</sup>

5.356 The report noted that Commonwealth GBEs accounted for approximately 24.5% of the Commonwealth's total assets of nearly \$165 billion in 1998–99. The Department of Finance and Administration (DoFA) reported in 1998–99 that Commonwealth GBEs generated revenue of nearly \$25 billion, provided dividends of \$4.5 billion and controlled assets of some \$40 billion. GBEs provide a range of services including communications, transport, employment and health services. DoFA stated that the performance of Commonwealth GBEs is critical in terms of public policy and in achieving sustainable government finances.

5.357 The report claimed that generally GBEs satisfy three criteria

- ?? they are commercial
- ?? they trade outside the public sector, and
- ?? they are not primarily regulatory bodies.

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624 Parliament of the Commonwealth of Australia Report 372 *Corporate governance and accountability arrangements for Commonwealth government business enterprises* Canberra 1999. The following discussion of Commonwealth GBEs is derived from this report, and in particular, para 1.11–12, 1.26–27, 2.34–2.40.

5.358 The report stated that a Commonwealth GBE is a Commonwealth authority or company that is prescribed by the regulations of the *Commonwealth Authorities and Companies Act 1997* (Cth). A Commonwealth authority is a body corporate that is incorporated for a public purpose and holds money on its own account. A Commonwealth company is a company established under the corporations law of a state or territory in which the Commonwealth has a controlling interest.

5.359 Currently there are 14 Commonwealth GBEs, with most of them being companies. The continuing trend has been towards company status GBEs. In 1999, 10 of the 14 Commonwealth GBEs were companies, two were in the process of being corporatised and two will remain authorities. In 1995 of the then 20 GBEs only nine were companies. The JCPAA report considered that there were significant advantages in GBEs being companies.

5.360 Most GBEs are GOCs, and it is this latter group which generate the most complexity and controversy. GOCs must be distinguished from statutory authorities, which are bodies established by separate legislation relating to a particular government function. They may also be distinguished from statutory corporations, such as Australia Post and Telstra, which are also bodies established under separate legislation, although their policy objectives are often similar to those of a GOC.<sup>625</sup>

5.361 As Commonwealth GOCs are incorporated under the Corporations Law alone, and are not otherwise regulated by a GOC Act<sup>626</sup> they prima facie lack express provisions granting crown immunity. Whether they nevertheless have access to the immunities of the Commonwealth is complex. Clarifying this may require separate legislation regarding all Commonwealth GOCs, as exists in some state and overseas jurisdictions.<sup>627</sup>

5.362 In the case of private contractors, the issue of control gives way to that of function, and where a contractor may perform a range of different functions in a given time period, some pursuant to government contracts, some pursuant to

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625 D McGann 'Corporatisation, privatisation and other strategies – common legal issues' in B Horrigan (ed) *Government law and policy: Commercial aspects* Federation Press Sydney 1998, 57.

626 GOCs of the States and Territories, on the other hand, are generally regulated by GOC Acts. Across Australia, the status and structure of GOCs can be varied, given that they are established under a variety of State and territory corporations law regimes. In New South Wales and Queensland, the GOC legislation makes a distinction between company GOCs (incorporated and registered under the Corporations Law) and statutory GOCs (established under legislation but not registered: (*State Owned Corporations Act 1990* (NSW) s 3A; *Government Owned Corporations Act 1993* (Qld), s 7). As discussed in para 5.390–5.395, these distinctions have implications for questions of Crown immunity.

627 In some States, separate legislation regulates GOCs. In New South Wales, the *State Owned Corporations Act 1989* (NSW) states that GBEs are not representatives of the Crown or entitled to Crown immunity. However, in Queensland, New Zealand and Victoria, the relevant government owned corporations legislation have no such express provisions. See D McGann 'Corporatisation, privatisation and other strategies — common legal issues' in B Horrigan (ed) *Government law and policy: Commercial aspects* Federation Press Sydney 1998, 59.

private contracts, and some in furtherance of more than one contract, the analysis of function in a given case may be intricate.

### Tests for identifying who is the Commonwealth

5.363 There are two ways in which the status of an entity can be determined for the purpose of assessing whether it is entitled to the immunities of the Crown in right of the Commonwealth. First, there may be an express provision in the legislation establishing the entity, setting out unambiguously whether or not the entity in question is the Commonwealth at law, for the purposes of any legal proceedings against that entity. Second, in the absence of such an express term, the status of the entity must be determined by implication. In such cases, the nexus between an entity and the Commonwealth is generally construed by the courts according to two criteria: the nature of the activity that is carried out by the entity, and the relationship of control between the entity and the executive, usually a minister.

5.364 While the element of control is an important indicator of Commonwealth status, it is not always the case that an entity that is controlled by the Commonwealth is 'the Commonwealth' when performing a particular act. In the modern era of government, the Commonwealth carries out its activities through corporations, both government owned and private, whose functions may vary from time to time, and whose activities are sometimes, but not always, those of the Commonwealth.<sup>628</sup> The nature of such functions and activities has become paramount in determining whether they attract the 'shield of the Crown'. However, the varied circumstances of the cases have defied the development of clear and easily applied principles. It is this uncertainty that creates much of the controversy in crown immunity claims.

### *The case for express identification*

5.365 The issue of whether the entity in question is, in law, the Commonwealth, need not be complicated. In the simplest case, the entity in question is described in legislation as entitled to the immunities of the Crown and the issue ends there. To take the facts in *Bradken*<sup>629</sup> as an example, the *Railways Act 1914* (Qld) s 8(1) stated that the Queensland Commissioner for Railways 'shall be capable in law of suing and being sued, and as such corporation, for all the purposes of any Act, shall have and may exercise all the powers, privileges, rights, and remedies of the Crown'. Consequently, there could 'be no doubt that the Commissioner is an agent of the Crown in right of the State of Queensland, and entitled to its privileges and

628 Senate Standing Committee on Legal and Constitutional Affairs *The doctrine of the shield of the Crown* Report Commonwealth of Australia Canberra 1992, 12.

629 (1979) 145 CLR 107. The *Trade Practices Act 1974* (Cth) did not apply to the Queensland Commissioner for Railways. The Act contained an express provision binding the Crown in right of the Commonwealth, but not the Crown in right of Queensland.

immunities'.<sup>630</sup> However, there are many situations where there is no such express provision, or where there is, but the entity in question engages in an activity which does not fall within the express terms of such agency.

5.366 In *Townsville Hospitals Board v Council of the City of Townsville*,<sup>631</sup> the High Court stressed that, when considering the enacting legislation of statutory bodies, the presumption ought to be that the body should only benefit from crown immunity if this is expressly provided. The Court applied the control and functions tests, but found that these did not establish that the hospital was an emanation of the Crown. This conclusive decision generally reflects the current approach towards the entitlement of Commonwealth emanations to such privileges.

It has more than once been said in this Court that 'there is evidence of a strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless Parliament has by express provision given it the character of a servant of the Crown'...It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention'.<sup>632</sup>

5.367 The view that a statutory body should be expressly conferred with the immunity of the Commonwealth is shared by a number of commentators. Horrigan discusses the importance of considering, when planning its establishment, the extent to which the body is designed to expose the government to liability. He argues that 'those responsible for the incorporating legislation of a GBE or other statutory body must consider its status and amenability to liability in their drafting'.<sup>633</sup>

5.368 An alternative argument is that a nexus between the Commonwealth and its emanations is not alone sufficient to justify extending the 'shield of the Crown,' and that statutory Crown status alone should not attract every or even any crown immunity. Many writers and judges have thought that various of the privileges of the Crown should be abolished or, at the very least, not indiscriminately extended to the numerous public authorities that have been created by every modern government.<sup>634</sup>

5.369 The Senate Standing Committee on Legal and Constitutional Affairs addresses this issue in its report *The doctrine of the shield of the Crown*. The Committee concluded that, even though the functions performed by the body

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630 *Bradken Consolidated Ltd v Broken Hill Proprietary Co. Ltd.* (1979) 145 CLR 107, 115.

631 *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR.

632 See also *Launceston Corporation v Hydro-Electric Commission* (1959) 100 CLR 654, 662; *State Electricity Commission of Victoria v City of South Melbourne* (1968) 118 CLR 504, 510.

633 B Horrigan 'Governmental liability, crown immunity and native title implications' in B Collier & S Pitkin (eds) *Corporatisation and privatisation in Australia* CCH Aust Ltd Sydney (1999) 215, 235.

634 R Flannigan 'Crown agent status' (1988) 67 *Canadian Bar Review* 231.

should still be considered when determining its Crown character, express provisions would mean certainty, and ‘this would allow the legislature rather than the judiciary to determine whether or not non profit, public interest or regulatory bodies can benefit from the shield of the Crown’.<sup>635</sup> As noted above, the Committee’s recommendation entailed a reversal of the Crown’s immunity from statute, such that all future legislation pertaining to the establishment of bodies under the government would have to specify whether an entity had any claim to Commonwealth immunities. Such legislative provisions, specific to the entity in question, would operate subject to general provisions which clarify to what extent the Commonwealth itself may benefit from immunities.

**Question 5.68.** Should legislation establishing Commonwealth statutory bodies, offices and agents specify expressly (a) what, if any, privileges or immunities extend to the entity, and (b) what functions of the entity are authorised by the Commonwealth?

### *The government function/activity test*

5.370 The activities of Commonwealth Crown agents were for many years accorded the status of ‘functions incidental to the exercise of the Commonwealth’s constitutional powers,’ and consequently not liable to state laws.<sup>636</sup> The High Court found simply that it was implicit in the power given to the executive government that the incidents and consequences of its exercise would not be subject to state laws.<sup>637</sup> However, as government activities became more diverse, it was no longer possible to determine easily what a ‘traditional’ or ‘usual’ function of government was. This complexity is illustrated by the series of cases involving government banking institutions.

5.371 In *Bank of New South Wales v Commonwealth*,<sup>638</sup> the Commonwealth Bank was found to be an agent or emanation of the Crown and to have the protection of Commonwealth immunity. In addition to the degree of influence and control that the Commonwealth had over the Bank, the High Court advocated that a test for whether or not an entity was protected by Commonwealth crown immunity should be whether or not the corporation was ‘a convenient means of carrying on a

<sup>635</sup> Senate Standing Committee on Legal and Constitutional Affairs *The doctrine of the shield of the Crown* Report Commonwealth of Australia Canberra 1992, 113.

<sup>636</sup> In *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1, for example, land that had been occupied by the Army during the Second World War was found to be exempt from local council rates under State legislation, as its use was ‘a function of government’.

<sup>637</sup> J McCorquodale ‘Immunity of Commonwealth government business enterprises from state laws’ (1992) 66 *Australian Law Journal* 406, 407.

<sup>638</sup> *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.



Commonwealth activity'.<sup>639</sup> It was, and immunity was accordingly extended by the High Court.

5.372 In *Inglis v Commonwealth Trading Bank of Australia*<sup>640</sup> the High Court, led by Kitto J, agreed with the majority in *Bank of New South Wales v Commonwealth*, and held that the Commonwealth Trading Bank is a part of the Commonwealth Bank, which was divided to make its functions more efficient, and such divisions 'established simply as instruments by which the Commonwealth participates in the business of banking'.<sup>641</sup> In this case, the emanation of the Crown was again found to attract the shield of the Crown, on the basis that the act in question specified that the banks were 'directed to the greatest advantage of the people of Australia and have due regard to the stability and balanced development of the Australian economy'.<sup>642</sup> Kitto J held that the traditional test of a Commonwealth activity, being one which is traditionally governmental in character, was inadequate and that

The question is rather what intention appears from the provisions relating to the respondent in the relevant statute: is it, on the one hand, an intention that the Commonwealth shall operate in a particular field through a corporation created for the purpose; or is it, on the other hand, an intention to put into the field a corporation to perform its functions independently of the Commonwealth, that is to say otherwise than as a Commonwealth instrument, so that the concept of a Commonwealth activity cannot realistically be applied to that which the corporation does?<sup>643</sup>

5.373 In dissent, Owen J held that the Trading Bank was no different from any other bank in its activities, doing no more than carrying on the general business of banking, and consequently that it was 'not to be regarded as a part of, or an agency of, the Commonwealth Government so as to enable an action to be brought against it in the original jurisdiction of this Court as being "a person sued on behalf of the Commonwealth."'<sup>644</sup>

5.374 The majority view continued to prevail after *Inglis*. In *Maguire v Simpson*,<sup>645</sup> the High Court decided that the Trading Bank was 'the Commonwealth' for the purposes of s 64 JA. This decision established that, in an appropriate context, the words 'the Commonwealth' are wide enough to include a corporation which is an agency or instrumentality of the Commonwealth, as there is 'no reason why a distinction between essential and non-essential functions of government should be drawn in applying s 64 to statutory corporations which represent the Commonwealth'.<sup>646</sup>

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<sup>639</sup> id, 274 (Rich and Williams JJ).

<sup>640</sup> *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334.

<sup>641</sup> id, 342 (Kitto J).

<sup>642</sup> id, 342 (Kitto J).

<sup>643</sup> id, 338 (Kitto J).

<sup>644</sup> id, 346 (Owen J).

<sup>645</sup> *Maguire v Simpson* (1977) 139 CLR 362.

<sup>646</sup> *Maguire v Simpson* (1977) id, 398–399 (Mason J).

5.375 In *Deputy Commissioner of Taxation v State Bank of New South Wales* the High Court held that, ‘by a like process of reasoning’ to that in *Maguire v Simpson*, the words ‘a State’ have a similarly wide meaning.<sup>647</sup> The High Court relied on *Crouch v Commissioner for Railways*,<sup>648</sup> where it was held unanimously that the Commissioner for Railways (Qld) was the ‘Crown’ of the State of Queensland, being an instrumentality ‘through which the executive government of the state discharges an important part of its governmental functions’.<sup>649</sup> The High Court also referred to *State Bank of New South Wales v Commonwealth Savings Bank of Australia*,<sup>650</sup> which was ‘decisive’<sup>651</sup> of the issue, stating that ‘the state carries on banking through its statutory corporation, the Bank, and that it necessarily follows that the Bank is for this purpose New South Wales’.<sup>652</sup>

5.376 Consequently, for the purposes of jurisdiction under the Constitution, but also crown immunity, it was generally the case that the meaning of ‘State’ and ‘Commonwealth’ were construed broadly and in a similar fashion.<sup>653</sup> Despite this, in *Henderson*, the High Court applied *Inglis* but nevertheless concluded that the Commonwealth Defence Housing Authority might not be regarded as the Commonwealth for the purposes of s 64 JA, ‘having regard to the function which it performs, the limited control exercised by the Minister and the requirement that it perform its function in accordance with sound commercial practice’.<sup>654</sup> Since that body was created under the *Residential Tenancies Act 1987* (NSW) however, with the express terms binding it to the Crown, the Court’s ultimate decision did not turn on whether or not the body was impliedly an emanation of the Crown by virtue of its control and function.<sup>655</sup>

### ***The control test***

5.377 In the absence of an express provision, the capacity of an entity to claim the privileges of the Crown generally depends upon the capacity of the executive government to control the entity’s most important functions. The test can be analogised to the test for the vicarious liability in employment — ‘does the employer have sufficient control over the employee so that the acts of the employee should be attributed to the employer?’<sup>656</sup> Lack of control is a common factor in determining that, what would otherwise be Crown activity, is in fact a private activity, for the purposes of the shield of the Crown.

647 *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 231.

648 *Crouch v The Commissioner for Railways (Qld)* (1985) 159 CLR 22, 30–33.

649 id, 38 (Mason, Wilson, Brennan, Deane and Dawson JJ).

650 *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639, 652.

651 *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 233.

652 *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639, 652.

653 See also *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315; *Bohwell v Australian Telecommunications Commission* (1982) 61 FLR 154.

654 *Re The Residential Tenancies Tribunal of NSW and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410, 448 (Dawson, Toohey, Gaudron JJ).

655 id, 448 (Dawson, Toohey, Gaudron JJ).

656 N Seddon ‘Commonwealth companies and the Constitution’ (1998) 26 *Federal Law Review* 271, 293.

5.378 In the case of crown servants and officers of statutory corporations, the control test is viewed as a matter of the actual, rather than purely legal or technical, relationship between the entity and the Commonwealth. As held in *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*,

If a corporation is no more than the passive instrument of the Crown, subject in a high degree to control by the executive, it is appropriate enough that its acts be viewed as those of its master and that it be itself treated as the alter ego of the Crown, enjoying accordingly those immunities and privileges with which the Crown is clothed. If, on the contrary, a statutory corporation is essentially autonomous, its acts being in no sense the outcome of directions by the executive but truly its own, there will be little reason to clothe it with any of those immunities or privileges.<sup>657</sup>

5.379 The reluctance of courts to recognise that all emanations of the Crown are entitled to crown immunity was again demonstrated in *Townsville Hospitals Board v Council of the City of Townsville*.<sup>658</sup> The High Court held that, although there was a degree of ministerial control over the Board, the Board still retained a substantial amount of decision-making power.<sup>659</sup> With respect to building projects, the provisions effectively involved ministerial interjection only by way of approval. The plans for projects were still initiated by the Board, and despite the substantial connection with the Crown, its immunity was not extended.<sup>660</sup>

### *The form of entity test*

5.380 The element of control may be difficult to establish, where the entity in question is incorporated under companies legislation. As discussed below, the issue of control is thus most controversial when the entity is a GOC, where questions may arise as to the application of provisions of the Corporations Law to an entity entitled to some privileges of the Crown. As a Commonwealth GOC is not incorporated under specific and separate legislation, it must be incorporated under the general corporations law applicable in the state in which the corporation is to carry out its principal functions.<sup>661</sup>

5.381 In *Bogle*, Commonwealth Hostels Ltd, a company limited by guarantee incorporated by the Commonwealth under the *Companies Act 1938* (Vic), was found not to be an agent or instrumentality of the Crown, and thus was not able to claim immunity from the provisions of a Victorian statute regulating charges to hostels.<sup>662</sup> This was despite the fact that the Commonwealth was exercising executive power, the Minister controlled the board and the business, all subscribers

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657 (1979) 145 CLR 330, 349 (Stephen J).

658 *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282.

659 id, 291.

660 ibid.

661 N Seddon 'Commonwealth companies and the Constitution' (1998) 26 *Federal Law Review* 271, 292.

662 J McCorquodale 'Immunity of Commonwealth government business enterprises from state laws' (1992) 66 *Australian Law Journal* 406, 409.

to the memorandum of association were Commonwealth public servants, the company relied on public revenue, and that it controlled Commonwealth property. The High Court held that these facts did not override the legal status of the company as an independent entity.

It is said that the company was formed at the instance of the Commonwealth, that the Commonwealth through the Minister is in a position under the articles to control the company, and that the ultimate financial interest is that of the Commonwealth. But none of these things can affect the legal character of the company as a person suing in the courts. If the company were a company limited by shares, it could make no difference that the Commonwealth held ninety-nine per cent of the shares.<sup>663</sup>

5.382 As is the case with vicarious liability however, which also relies upon a relationship of control, the practical effect of the above decisions in severing the Commonwealth from the corporation must be considered. That is, does a lack of Commonwealth status simply prevent the corporation benefiting from Crown immunities, or does it prevent the Commonwealth from being liable for the acts of the corporation and becoming a defendant in legal proceedings in respect of such acts?

#### ***The commercial activities test***

5.383 As noted above, the pre-eminence of corporate entities carrying out Commonwealth government functions has significantly complicated the task of applying the above tests for determining whether an entity is ‘the Commonwealth’. The legal difficulties that arise from GBEs in regard to crown immunity, result from their existence as ‘hybrid entities which straddle the division between public and private law’.<sup>664</sup> The bodies operate within a governmental framework, and yet are involved in commercial activities. The development of these entities has created a new sphere, framed by uncertainty, as ‘corporatisation and commercialisation of governmental activities has altered the very basis upon which the law relating to crown immunity and privilege was once framed’.<sup>665</sup>

5.384 As with any statutory body, if there is no express provision for crown immunity in the enacting legislation of a GBE, the courts are reluctant to conclude that a body is an agency or emanation of the Commonwealth.<sup>666</sup> The question of whether an activity of a Commonwealth entity is commercial or non commercial thus operates as a modern branch of the ‘usual functions’ test. That is, even if its

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<sup>663</sup> *Commonwealth v Bogle* (1953) 89 CLR 229, 267–8 (Fullagar J).

<sup>664</sup> B Horrigan ‘Contemporary sources and limits of crown immunity, governmental liability and legislative invalidity’ in B Horrigan (ed) *Government law and policy: Commercial aspects* Federation Press Sydney 1998, 287.

<sup>665</sup> S Kenny ‘Principles of statutory interpretation relating to government’ in P Finn (ed) *Essays on law and government: Volume 2 — The citizen and the State in the Courts* LBC Sydney 1996, 236.

<sup>666</sup> J McCorquodale ‘Immunity of Commonwealth government business enterprises from state laws’ (1992) 66 *Australian Law Journal* 406, 410.

activities are usual functions of government, and even if there is the requisite level of Commonwealth control, if such activities are commercial in nature, the entity may not be able to benefit from immunity from laws which would apply to private interests. On the other hand, if the body has a non-commercial, public interest nature, it is more likely to be entitled to the immunity of the Crown.<sup>667</sup>

5.385 This question is rarely straightforward, as even though a GOC may be primarily commercially oriented, it will often take on responsibility for some traditional government services, known as community service obligations (CSO). These are generally non profit activities in fulfilment of some social obligation of government to the community. CSOs are performed at the direction of government, and thus ‘it is arguable that when performing these activities a GOC should be entitled to the immunity of the Crown’.<sup>668</sup> The commercial activities test is by no means clear, therefore, and is not set down in legislation. The Senate Standing Committee on Legal and Constitutional Affairs saw a need for statutory abrogation of the shield of the Crown doctrine in respect of corporatised government entities.

The doctrine is inconsistent with two principal concepts of corporatisation: first the idea of competitive neutrality; and second, the high degree of operational autonomy and responsibility needed to achieve improved efficiency and performance. Where GBEs or statutory corporations engage in purely commercial activities and compete with private enterprise it may be desirable to eliminate the operation of the shield doctrine altogether.<sup>669</sup>

5.386 Of course, it should also be noted that the commercial or non commercial nature of the functions and activities of an entity are not necessarily sufficient to determine crown immunity in all cases.<sup>670</sup> For example, as held in *Deputy Commissioner of Taxation v State Bank of NSW*, government banking, while commercial in nature, can be a government function which attracts the immunity of the Commonwealth, and

decisions of this Court establish not only that the Parliament may set up a corporation to carry out any of the executive functions of government on the footing that it is an agency or instrumentality of government but also that the Commonwealth Trading Bank is the Commonwealth notwithstanding that it is a body corporate.<sup>671</sup>

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667 B Horrigan ‘Governmental liability, crown immunity and native title implications’ in B Collier & S Pitkin (eds) *Corporatisation and privatisation in Australia* CCH Aust Ltd Sydney (1999) 215, 225.  
 668 D McGann ‘Corporatisation, privatisation and other strategies — common legal issues’ in B Horrigan (ed) *Government law and policy — commercial aspects* Federation Press Sydney 1998, 60–1.  
 669 Senate Standing Committee on Legal and Constitutional Affairs *The doctrine of the shield of the Crown* Report Commonwealth of Australia Canberra 1992, para 9.9.  
 670 *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219, 231.  
 671 *id.*, 233.

**Question 5.69.** Does the operation of the ‘shield of the Crown’ more often benefit a) entities who seek to exploit Crown immunities, or b) entities who seek to join the Crown as a defendant, rather than the entity directly involved in a claim. Is this relevant as a policy issue when deciding whether and to what degree Crown status should extend to entities which are somehow connected to the Crown?

**Question 5.70.** In the absence of an express statutory provision regarding the Commonwealth status of an entity, are the ‘control’ and ‘functions’ tests sufficient to determine whether the entity attracts the ‘shield of the Crown’. Should these tests be confirmed or improved in legislation?

**Question 5.71.** In what circumstances, if any, and to what extent, if at all, should government business entities which engage in commercial activities benefit from Commonwealth immunities?

**Question 5.72.** If the Commonwealth’s immunities are to be removed when it carries out commercial activities, should this be set down in legislation? Should such provisions be included in the *Judiciary Act*, in the Corporations Law and in all enacting legislation of statutory corporations?

## The ‘Commonwealth’ in practice

In broad terms, there is greater scope for Crown liability under the modern law. The corollary is that there is reduced scope for Crown immunity under the modern law.<sup>672</sup>

### *Commonwealth servants*

5.387 Under Australian colonial law, the exposure of the government to suit was limited by the conservatism of the day, which prescribed that the government was not to be held liable for acts carried out by its numerous officers and boards, and consequently, ‘these officers and boards may have been performing governmental functions, but to the judges they were not officers or agencies of the government for Claims Act purposes’.<sup>673</sup> The colonial courts read down the government’s liability, limiting it to those activities which government authorised, controlled or supervised. This did not include, for example, acts carried out by a police officer in the course of his duty.<sup>674</sup> This approach grew out of a proprietary concept that the

672 B Horrigan ‘Government liability, crown immunity and native title implications’ in B Collier & S Pitkin (eds) *Corporatisation and privatisation in Australia* CCH Aust Ltd Sydney (1999) 215, 222.

673 P Finn ‘Claims against the government’ in *Law and government in colonial Australia* OUP Melbourne 1987, 150.

674 *Delacauw v Fosbery* (1896) 13 WN (NSW) 49.

acceptance of a public office carried with it a notion of personal responsibility for one's conduct, and a notion that there would be dire consequences for a state which accepted such wide responsibility for individual actions; consequences which 'would involve the whole fabric of the state in confusion and disaster'.<sup>675</sup>

5.388 Despite the characterisation of 'the Government' in the statutes by reference to the doctrines of ministerial responsibility, the extension of liability to Crown servants was determined according to ordinary vicarious liability rules, which are necessarily far narrower.<sup>676</sup> When it came to statutory boards, the courts ignored the political control of government via its ministers over such entities and claims were thus confined to the level of the board itself. As Finn puts it, the limited approach taken by the courts was symptomatic of a formalistic, rather than an organic view of Government 'which saw the public officers and boards as acting within their several spheres for 'the state' and ultimately under the control of the minister who either in the Parliament or in the Executive, conducted the public affairs of the colony'.<sup>677</sup>

5.389 Following federation, the colonial formalism in interpreting the functions and activities of the Commonwealth continued to be applied by the courts. Consequently, it is generally the case that Commonwealth servants and agents (other than employees for whom the Commonwealth is vicariously liable) are indemnified by the Commonwealth, only if such agency is expressly created by statute or clearly derives from the existence of ministerial control.

Municipal bodies, school boards, universities, hospitals, regulatory agencies, administrative tribunals and public corporations, even if they are performing 'governmental functions', are not agents of the Crown, unless they are controlled by a Minister or expressly declared by statute to be an agent of the Crown.<sup>678</sup>

**Question 5.73.** Should the status and liability of individuals or bodies who serve as officers or agents of the Commonwealth but are not subject to enacting legislation (or to general regulatory legislations such as that applicable to corporations) be set down in separate legislation?

### *Government business entities*

<sup>675</sup> *Enever v The King* (1906) 3 CLR 969, 983 (Barton J). See P Finn 'Claims against the government' in *Law and government in colonial Australia* OUP Melbourne 1987, 151.

<sup>676</sup> See para 5.134–5.154 for a detailed discussion of the vicarious and direct liability of the Crown.

<sup>677</sup> P Finn 'Claims against the government' in *Law and government in colonial Australia* OUP Melbourne 1987, 152.

<sup>678</sup> P Hogg *Liability of the Crown* 2nd ed LBC Ltd North Ryde 1989, 10.

5.390 The status of GBEs and GOCs has become of great importance and controversy in recent years, as their number in the market place has grown significantly, and as more and more attempts have been made to use the ‘shield of the Crown’ to protect them from unwelcome legislative provisions. For example, the Senate Standing Committee in 1992 noted ‘a perception that the shield doctrine was allowing statutory corporations and their private enterprise associates to evade the provisions of companies and securities legislation’.<sup>679</sup>

5.391 As discussed above, however, crown immunity is not necessarily an ‘all or nothing’ attribute for GBEs. They may carry out functions which are governmental or non governmental, and more importantly, they may engage in activities, some of which are purely commercial in nature and some of which are non commercial. Thus, GBEs may attract crown immunity for some activities but not for others.<sup>680</sup> It is necessary then to take account of the particular functions of the GBE and the activities it performs to determine the likelihood of the GBE attracting crown immunity.<sup>681</sup> As stated by Stephen J in *Superannuation Fund Investment Trust v Commissioner Of Stamps (SA)*

On occasions the legislative intent may be a complex one, especially where a corporation has conferred upon it a number of quite distinct functions. The intention may be that only some of these should attract the immunities and privileges of the Crown. Again, whether a corporation possesses one or more functions, the intention of the legislation may be that only some of the Crown’s immunities and privileges should attach to it.<sup>682</sup>

**Question 5.74.** Is the law clear in respect of which of the multiple functions and activities of a GOC attract Commonwealth immunity, and which do not? Should this be clarified by amendment to the *Judiciary Act*, or in separate legislation?

### *Corporations law issues*

5.392 As discussed above, the distinction between statutory and company GOCs is important to the question of immunity. However, it is not wholly determinative. In theory, the fact of incorporation under the Corporations Law should attract all of the rights and duties which such legislation imposes on those beneath it, but this also depends upon other factors.

679 Senate Standing Committee on Legal and Constitutional Affairs *Report The doctrine of the shield of the Crown* Commonwealth of Australia Canberra 1992.

680 *ibid.*

681 D McGann ‘Corporatisation, privatisation and other strategies common legal issues’ in B Horrigan (ed) *Government law and policy: Commercial aspects* Federation Press Sydney 1998, para 2.3.3.

682 *Superannuation Fund Investment Trust v Commissioner Of Stamps (SA)* (1979) 145 CLR 330, 349 (Stephen J).



5.393 In *Bogle*, an incorporated entity was found not to attract Commonwealth immunity, because the level of Commonwealth control and the governmental nature of its function could not overcome the form and ‘legal character’ of the entity. However, in different circumstances, the High Court in *State Government Insurance Corporation v State Government Insurance Office (NSW)*<sup>683</sup> and *Deputy Commissioner of Taxation v State Bank (NSW)*<sup>684</sup> held that a Corporations Law entity might still benefit from Crown status. Again this may apply in some, but not all, circumstances.

5.394 A further complication is that, because the Corporations Law is part of national cooperative scheme of legislation, the application of the *Judiciary Act* and other crown proceedings legislation may be affected depending on whether or not it conflicts with the crown proceedings legislation in question.<sup>685</sup> That is, Part 4 of the Corporations Act (preliminary application) provides in s 15(1) that Chapter 5 of the Corporations Law, except for 5.8, binds the Crown in the right of both the legislating state and the Commonwealth. However, s 15(2) provides that Part 7 does not bind the Crown. Section 16 provides that the Crown includes a reference to any Crown agent or instrumentality of the Crown’. As the Senate Standing Committee on Legal and Constitutional Affairs pointed out in 1992, ‘presumably a Crown corporation would share in these exemptions’.<sup>686</sup> It seems, however, that the exceptions benefiting the Crown are wider still. In *Australian Securities Commission v SIB Resources NL*<sup>687</sup> Ryan J held that no general provisions of the Corporations Law outside Chapter 5 bind the Crown.<sup>688</sup>

5.395 It must be noted that, following *Re Wakim; Ex parte McNally*<sup>689</sup> and *R v Hughes*,<sup>690</sup> it is intended that the power of the states to regulate corporations will be referred by the states to the Commonwealth pursuant to s 51(xxxvii) of the Constitution, and the eight separate Corporations Law statutes will be replaced by a single federal statute.<sup>691</sup> It is unclear to what extent this new Act will bind the Crown in right of the states or the Commonwealth.

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683 (1991) 101 ALR 259, 307.

684 (1992) 174 CLR 219, 230.

685 B Horrigan ‘Contemporary sources and limits of Crown immunity, governmental liability and legislative invalidity’ in B Horrigan (ed) *Government law and policy: Commercial aspects* Federation Press Sydney 1998, 292.

686 Senate Standing Committee on Legal and Constitutional Affairs *The doctrine of the shield of the Crown* Report Commonwealth of Australia Canberra 1992, 85.

687 (1991) 5 ASCR 411.

688 See B Horrigan ‘Contemporary sources and limits of Crown immunity, governmental liability and legislative invalidity’ in B Horrigan (ed) *Government law and policy: Commercial aspects* Federation Press Sydney 1998, 294.

689 (1999) 163 ALR 270.

690 (2000) 171 ALR 155.

691 I Govey & H Manson ‘Measures to address Wakim and Hughes: How the referral of powers will work’ *The future of corporate regulation: Hughes & Wakim and the referral of powers* Conference Papers Sydney 3 November 2000.

**Question 5.75.** To what extent should a Commonwealth corporate entity be subject to the Corporations Law, and hence to the same rights and obligations as private corporations? Should this be specified in all enacting legislation of statutory corporations? Given the prevalence of GOCs, could this be achieved by separate legislation of general application and/or by amendment to the *Judiciary Act*?

**Question 5.76.** In the event that the corporations law is repealed and replaced by a single federal Act, how should this Act address the issue of whether its provisions bind the Crown in right of the Commonwealth and the states?

### *The Trade Practices Act 1974 (Cth)*

5.396 The protection of statutory corporations and agencies by Commonwealth immunity is most commonly challenged in the realm of trade practices law. A corporations law company can be considered the Crown if the Commonwealth has a controlling interest. A corporations law company controlled by the Commonwealth can thus be bound by the *Trade Practices Act 1974 (Cth)* (TPA) in the same limited way as the Commonwealth.<sup>692</sup> The *Trade Practices Act* is empowered by sections 51(i) and 51(xx) Constitution, which encompasses ‘trade or commerce’ and ‘trading and financial corporations’ respectively.<sup>693</sup> As with other Commonwealth agents, the functions and activities of the company are examined, rather than the purpose of its incorporation, when deciding the status of the company.<sup>694</sup> Once it has been determined that the body is a financial or trading corporation, the courts must then look at whether or not crown immunity extends to the particular agency.<sup>695</sup> If shielded by the Crown, these agencies are not affected by the competitive principles that regulate private enterprises.<sup>696</sup>

5.397 In theory, the enactment of s 2A of the *Trade Practices Amendment Act 1977 (Cth)* is recognition that the Commonwealth should accept similar restrictions in its commercial dealings, to those imposed on non-governmental businesses.<sup>697</sup> However, while both the *Trade Practices Act* and the state fair trading legislation apply to Commonwealth agencies, there exist significant exemptions, principally by virtue of the wording of s 2A, which states that the Act

692 N Seddon ‘Commonwealth companies and the Constitution’ (1998) 26 *Federal Law Review*, 271, 292.

693 Note there is extended operation in s 6 of the TPA, pursuant to various other heads of power, but not in particular issue here.

694 R Steinwell ‘The liability of the Crown and its instrumentalities under the Trade Practices Act’ (1994) 17 *UNSW Law Journal* 314, 315.

695 id, 315.

696 id, 316.

697 *Hansard* (H of R) 3 May 1977, 1447.

(1)...binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.

(2) Subject to the succeeding provisions of this section, [the Act] applies as if:

- (a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and
- (b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business; were a corporation.

5.398 Therefore, where the Crown carries on a business it will be subject to the *Trade Practices Act*, and treated as a corporation, but not otherwise. Problems are caused by the lack of a clear interpretation of the term ‘business’.<sup>698</sup> There are few cases dealing with the meaning of ‘business’ in relation to the applicability of the *Trade Practices Act* to the Commonwealth.<sup>699</sup> Those cases that have considered the application of s 2A have determined that ‘carrying on a business’ covers the activities of the Australian Telecommunications Commission,<sup>700</sup> the Australian Postal Commission<sup>701</sup> and the Australian Broadcasting Commission,<sup>702</sup> and those of the Department of Administrative Services in developing a property site. However, the Trade Practices Commission has been held not to carry on business.<sup>703</sup> In *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* Mason J described terms such as ‘business’, as having ‘about them a chameleon-like hue, readily adapting themselves to their surroundings, different though they may be’.<sup>704</sup>

5.399 In the 1997 Federal Court case of *JS McMillan Pty Ltd v Commonwealth*,<sup>705</sup> Emmett J held that a once off decision by the Commonwealth to cease engaging in the activities of AGPS in the future, to dispose of its plant and equipment and invite private enterprise to take over such business, was ‘not conduct in the carrying on of a business,’ and that s 2A did not apply to bind the Commonwealth in the proceedings. His Honour went on to comment that

In the light of the factual findings which I have made, that is unfortunate. However, it is for the Parliament to determine the extent to which the *Trade Practices Act* binds the Commonwealth. One might harbour a wish that in the circumstances, the Commonwealth would remedy the effect of the conduct which I have found misleading. However, it is not bound to do so.<sup>706</sup>

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698 N Seddon ‘Crown immunity and the unlevel playing field’ (1998) 5(4) *Agenda* 476.

699 id, 470.

700 *Tytel Pty Ltd v Australian Telecommunications Commission* (1986) 67 ALR 433, 436 (Jackson J).

701 *Suatu Holdings Pty Ltd v Australian Postal Commission* (1989) 86 ALR 532, 548 (Gummow J).

702 *Sun Earth Homes Pty Limited v Australian Broadcasting Corporation* (1991) ATPR 41–067, 52,035 (Burchett J).

703 (1979) 40 FLR 257, 275 (Deane and Fisher JJ).

704 *Thompson Publications (Australia) Pty Ltd v Trade Practices Commission* (1982) 150 CLR 355, 378–379.

705 *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419.

706 id, 438.

5.400 Arguably, the consequences of *J S McMillan*, if upheld, could prove to be problematic and may result in the Commonwealth not being bound by the *Trade Practices Act* in respect of most of its commercial activity, including procurement and contracting out. Arguably, a preferable approach would be to remove the words ‘carries on a business,’ or to give them a wider interpretation, which would support government liability under the trade practices legislation, ‘so as to accord with the evident purpose behind the provisions which were meant to ensure that governments could no longer hide behind crown immunity’.<sup>707</sup>

5.401 The distinction between the Commonwealth Crown and the state Crown also affects the application of the *Trade Practices Act*. While s 2A expressly binds the Crown in the right of the Commonwealth, s 2B, which applies to the Crown in the right of the states, binds the states only in respect of Part IV (Restrictive Trade Practices) and Part XIB (The Telecommunications Industry) and related provisions.<sup>708</sup> The fair trading legislation passed by each state and territory expressly binds its Crown. For example, the *Fair Trading Act 1987* (NSW) binds the state Crown so far as the state carries on a business, directly or by an authority of the state.<sup>709</sup> However, although it appears that the Crown is bound to consumer protection principles, the *Fair Trading Act 1987*(NSW) fails to extend Crown liability to competition law. The TPA regulates competition law in Australia, and it is here that crown immunity from the TPA is an issue for the states.<sup>710</sup>

**Question 5.77.** Should the *Trade Practices Act 1974* (Cth) be amended to clarify the types of activity for which the Commonwealth is to be treated as an ordinary corporation, and those for which it may benefit from Crown immunities. What activities, if any, might fall into each of these two categories?

**Question 5.78.** Should the *Trade Practices Act 1974* (Cth) be amended so as to bind the states to the same degree to which it binds the Commonwealth? If so, is the Commonwealth Parliament sufficiently empowered by the Constitution to do so?

707 See N Seddon ‘*JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419: the Trade Practices Act and governmental immunity’ (1998) 26 *Federal Law Review* 401.

708 R Steinwell ‘The liability of the crown under the Trade Practices Act’ (1994) 17 *UNSW Law Journal*, 314–325, 318.

709 id, 316.

710 id, 317.

***Private corporations under government contract***

5.402 In addition to GOCs, private corporations that have been contracted to perform government services may also be able to claim crown immunity. The idea that crown immunity should apply to private sector companies rather than to government agencies, potentially expands the realm of crown immunity. At its most extreme, companies that supply to the government rather than performing tasks for the government, may be able to claim immunity.<sup>711</sup> It has been argued that this stretches the shield of the Crown too far. As Seddon puts it

How can companies contracted to the government under a contracting out arrangement possibly claim a sort of ‘vicarious’ or derivative immunity? With the huge emphasis by all governments on contracting out to private enterprise, the possibility that Crown immunity goes with the package is truly alarming.<sup>712</sup>

5.403 In addition, private sector companies under contract may benefit from a derivative form of crown immunity in protection of Crown interests, rather than as companies who are direct agents of the Crown. In *Bradken*, the Court decided that the Commissioner of Railways (which had been determined to be an agency of the Crown in the right of Queensland), must be entitled to immunity or else ‘the application of the legislation to them would have prejudiced the interests of the Crown’.<sup>713</sup> The decision evolved from the concern that ‘all the relief sought, if granted, would have invalidated, in whole or in part, a transaction to which the Commissioner was a party’.<sup>714</sup> In effect, by not allowing contracting private companies the entitlement to crown immunity, the Crown would be partly denied immunity themselves, and this would be detrimental to the objects of the Crown agency.

5.404 In *Bass v Permanent Trustee Company Ltd*, the ‘interest prejudiced’ rule from *Bradken* in respect of contractors was restated by a full Federal Court, but with limitations.<sup>715</sup> The issue in *Bass* was whether or not the private contracted party was entitled to crown immunity from Commonwealth legislation (the TPA) and state legislation (the *Fair Trading Act 1987* (NSW)). Unlike *Bradken*, relief in this case would not have invalidated the contract with the Crown.<sup>716</sup> Following *Bradken*, however, the Federal Court conceded that, in some cases ‘it is necessary to look beyond the type of relief sought in the proceeding and consider the effect of the proceeding on the position of the Crown’. Where such position is substantially affected crown immunity may extend in circumstances other than those in which

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711 N Seddon ‘Crown immunity and the unlevel playing field’ (1998) 5(4) *Agenda* 470, 475.

712 id, 474.

713 *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107, 124.

714 id, 112.

715 *Bass, Woodlands, Conca v Permanent Trustee Company Ltd* (1996) 139 ALR 127, 142 (Wilcox, Burchett, Olney JJ).

716 id, 142.

the Crown is a direct party to the contract.<sup>717</sup> Where a prejudice of this kind does not occur, the immunity may extend only if ‘the acts or omissions were carried out pursuant to the direction or request of the Crown’<sup>718</sup> and such a prejudice is only to be construed within strict limitations.

Despite the use in *Bradken* and other cases of words like ‘interests’ and phrases like ‘prejudicially affected’, for Crown immunity to attach to a person who is not ‘the Crown’, or a transaction to which the Crown is not a party, the legislation must significantly prejudice the Crown, eg by restricting actions it would otherwise be free to undertake or diminishing the value of its property. It seems to us that it is not enough that the interest of the Crown will be indirectly affected by the application of the statute. There would be a multitude of cases wherein that could be demonstrated, eg compliance with a statute will commonly diminish a taxpayer’s income and, therefore, Commonwealth tax revenue.<sup>719</sup>

5.405 On appeal, the High Court in *Bass, Woodlands, Conca v Permanent Trustee Company Ltd*<sup>720</sup> noted the Federal Court’s statements and that these ‘extend beyond’<sup>721</sup> the principle of construction as stated in *Bradken*, but did not consider the issue further, other than Kirby J’s prophetic comment that

[m]y conclusions leave to the future the consideration of a number of important questions raised by these appeals. They include whether the holdings of this Court in *Bradken* and in *Commonwealth v Evans Deakin Industries Ltd* should be re-opened; whether, at this stage in the understanding of the nature of a State of the Commonwealth, as provided for in the Constitution, it is appropriate to continue to treat it as an emanation of the Crown...<sup>722</sup>

5.406 As discussed in paragraphs 5.294–5.297, prior to *Henderson* the ability of a state Act to bind the Commonwealth executive was restricted by the *Cigamatic* doctrine, and a broad range and degree of Commonwealth activities were consequentially immune from state regulation. The likelihood of contractors of the Commonwealth benefiting from crown immunity would thus have been significantly greater than it is following the decision in *Henderson*. It may be that there are now very few circumstances where such immunity may extend, however, the future of current precedent seems doubtful.

**Question 5.79.** Should the immunities of the Commonwealth extend to entities that are affiliated with the Commonwealth but carry out commercial activities in competition with private persons?

717 id, 144.

718 id, 150.

719 id, 144.

720 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

721 id, 354 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne And Callinan JJ).

722 id, 374 (Kirby J).

**Question 5.80.** Should legislation be enacted to specify the extent to which the rights and obligations of the Crown extend to entities that are not creatures of statute but who act as its agents, for example, contractors? Could this be clarified by amendment to the *Judiciary Act*?

**Question 5.81.** In addition to the ‘control’ and ‘functions’ tests, should the test for extending crown immunity to a private corporation under contract with the Commonwealth, or an entity which may be the Commonwealth for some but not all purposes, be the degree to which Commonwealth interests are affected by the activities of that entity? If so, and in the light of the decisions in *Re The Residential Tenancies Tribunal of NSW and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410 and *Bass, Woodlands, Conca v Permanent Trustee Company Ltd* (1996) 139 ALR 127 to what degree must Commonwealth interests be affected for immunity to so extend?

## 6. The law applicable in federal jurisdiction

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### Introduction

#### What are choice of law rules?

6.1 Many legal disputes have factual connections with more than one state, territory or country. Choice of law rules are the rules a court applies in such circumstances to determine which of two or more laws should be applied to resolve the legal questions at issue.

6.2 Australian choice of law rules are derived from the English common law principles that were applied to resolve conflicts between laws of different countries. The common law rules generally determine the relevant law by first categorising the subject matter of the cause of action as one in tort, contract, succession to property, and so on. The rule then identifies a connecting factor, which indicates the 'law district' whose law it is to be applied. The law selected pursuant to such a rule is known as the law of the cause or the governing law. For example, if a question is categorised as involving succession to movable property, the common law choice of law rule is that the law of the deceased's domicile at the time of his or her death should be applied. Questions concerning immovable property, such as land, are governed by the law of the place where the property is situated, and so on. The connecting factor — the deceased's domicile in the first case and the location of property in the second — are distillations of a policy to find the system of law with the closest connection to the legal issue to be resolved.

6.3 The common law choice of law rules also recognise that certain matters are so closely entwined with the policy and interests of the court adjudicating the claim that they should be subject to its law, that is the law of the forum. Procedural



matters are the principal example of matters requiring the application of the law of the forum. The result, then, is that two distinct laws may apply to a given case: the law of the forum to procedural matters and the law of the cause to substantive matters. Depending on the circumstances of the case, the law of the cause may also be the law of the forum, so that the same system of law applies to resolving both procedural and substantive matters.

6.4 One difficulty with procedural matters being governed by the law of the forum is that most courts have different procedural laws. This is as true between jurisdictions within Australia as it is between Australia and other countries. The possibility then exists for plaintiffs to obtain the benefit of particular procedural rules by filing suit in the most advantageous jurisdiction — a process known as ‘forum shopping’. However, the plaintiff’s chosen court may have only a slender connection with the subject matter of the action and so unfairness results to the defendant. The distinction between procedural matters and substantive matters is therefore critical. Until recently, Australian courts took a very broad view of what was procedural, including in the concept both statutory caps on damages and statutes of limitation that barred the remedy but not the right.<sup>1</sup> However, this view has now been abandoned. In *John Pfeiffer Pty Ltd v Rogerson* the High Court remarked that

matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain*, ‘rules which are directed to governing or regulating the mode or conduct of court proceedings’ are procedural and all other provisions or rules are to be classified as substantive.<sup>2</sup>

6.5 The common law choice of law rules outlined above are generally uniform throughout Australia, but they may be modified by the Constitution, or by federal, state or territory legislation. In practice, the Constitution has not been regarded as having a significant impact on Australian choice of law rules (see paragraphs 6.8–6.14). Similarly, legislation has made only modest changes to the common law choice of law rules. The potential remains for significant expansion of federal, state or territory legislation specifying choice of law rules for Australia. In particular, in its report on *Choice of Law*,<sup>3</sup> the Commission recommended the enactment of a substantial number of choice of law rules to be applied by courts when exercising federal jurisdiction, with parallel choice of law rules to be enacted by the states in the exercise of state jurisdiction. To date these recommendations have received only minor implementation.<sup>4</sup>

1 *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433.

2 (2000) 172 ALR 625, 651.

3 Australian Law Reform Commission Report 58 *Choice of Law* Sydney 1992 (ALRC 58).

4 See, for example, *Choice of Law (Limitation Periods) Act 1993* (NSW) and cognate legislation in other states and territories by which the common law categorisation of limitation statutes as ‘procedural’ was set aside in favour of a ‘substantive’ classification.

## Constitutional solutions

6.6 Conflicts between laws within Australia may arise in a number of different contexts. In particular, there may be conflicts between

- ?? a federal law and a state law
- ?? a federal law and a territory law
- ?? a state law and another state law
- ?? a territory law and another territory law, and
- ?? a state law and a territory law.

6.7 In the case of a federal law and a state law, the Constitution itself provides the solution. Because the Commonwealth Parliament can make laws that bind the courts and people in every part of the Commonwealth,<sup>5</sup> and because s 109 of the Constitution provides that federal law shall prevail over state law to the extent of any inconsistency, no real conflicts can arise within Australia to the extent that proceedings are governed by a federal statute. In the case of a conflict between a federal law and a territory law, a similar result is achieved by application of the doctrine of repugnancy, which precludes territory laws from operating inconsistently with federal provisions from which they derive their ultimate authority.<sup>6</sup>

6.8 However, in the last three categories listed above it is less clear whether the Constitution provides a solution to resolve the conflict between such laws. It has been suggested that s 118 of the Constitution may require one state court to recognise and enforce the laws of another state in certain circumstances. Section 118 provides that

Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every state.

6.9 This provision was copied almost verbatim from the United States Constitution. Until the High Court's decision in *Breavington v Godleman*,<sup>7</sup> the section had been given very little judicial consideration. In *Breavington*, three justices (Mason CJ, Brennan and Dawson JJ) held that s 118 did not require a state court to apply the law of another state unless such law was first chosen pursuant to the common law choice of law rules. In other words, s 118 did not displace the common law choice of law rules with its own constitutional law-selecting formula. Rather, the Constitution reinforced the common law rules by mandating the application of the system of law selected by the common law choice of law rules.

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5 *Commonwealth of Australia Constitution Act 1900* (Imp) s 5.

6 *Northern Territory v GPO* (1999) 196 CLR 553; see also *Webster v McIntosh* (1980) 49 FLR 317, 320-321.

7 (1988) 169 CLR 41.

6.10 Three justices (Wilson, Deane and Gaudron JJ) took a contrary approach. In their view, the purpose of s 118, and the Constitution more broadly, was to ensure that one set of facts occurring in a state would be adjudged by one body of law and give rise to only one set of consequences, regardless of where in Australia the matter was heard. To give effect to this objective, s 118 must be interpreted as requiring, in the event of a conflict of laws within Australia, that each state and territory court must only apply its law to events occurring within its law area.

6.11 Toohey J declined to comment on the operation of s 118 because, on its terms, the section was not applicable to the facts of the case.<sup>8</sup> *Breavington* concerned the application in Victoria of a law of the Northern Territory. However, s 118 speaks only of giving full faith and credit to the laws of every state. This textual limitation did not constrain Wilson, Deane and Gaudron JJ, who considered that, for reasons of parity, the same principle should apply to the recognition of territory laws as applied to state laws.

6.12 The suggestion by some justices in *Breavington* that the full faith and credit clause provides a constitutional solution to intra-Australian choice of law problems has been rejected in subsequent High Court decisions, albeit over vigorous dissent.<sup>9</sup>

6.13 Despite rejection of a significant role for s 118, it has been recognised that the section has a residual effect on choice of law in Australia. In *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd*,<sup>10</sup> the High Court held that the principle that a forum may exclude the operation of foreign law on the ground that it is contrary to the forum's public policy did not apply to conflicts within Australia. Five justices in *Breavington* confirmed the correctness of this view.<sup>11</sup>

6.14 In a recent decision, *John Pfeiffer Pty Ltd v Rogerson*,<sup>12</sup> the High Court expressed sympathy for the idea that, in developing the common law choice of law rules for conflict of laws within Australia, the cultural, legal and political homogeneity of the Australian federation should be considered. In particular, the fact that the states and territories are part of a single nation, have inherited a single body of common law, and have a common right of appeal to the High Court, all suggest that an Australian court should exercise great deference to the law of another state or territory. In the Court's view, while such considerations should not be applied to displace the common law rules, they can be used to develop them. Consequently, rules that give too much weight to the law of the forum and so threaten the objective of uniformity of outcome will not be applied in the intra-

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8 id, 164.

9 *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433.

10 (1933) 48 CLR 565.

11 (1988) 169 CLR 41, 70 (Mason CJ); 96–7 (Wilson and Gaudron JJ); 116 (Brennan J) and 150 (Dawson J).

12 (2000) 172 ALR 625.

Australian context.<sup>13</sup> Such an approach is broadly consistent with that proposed by the Commission in ALRC 58. The current position with regard to choice of law for intra-Australian cases is thus that the common law rules continue to apply but will be interpreted subject to the unique features of the Australian federation.

## **The law applicable in federal jurisdiction**

6.15 Choice of law problems in Australia may arise in any case with factual connections with more than one state or territory, whether the case falls within state or federal jurisdiction. Where the matter is one of state jurisdiction, the principles briefly outlined above will be applied. Where the matter is one of federal jurisdiction, the same principles may be relevant, but there is an additional layer of complexity, which arises for two reasons.

6.16 The first reason is that the Commonwealth Parliament is one of limited legislative powers and so can only make valid laws in the exercise of powers specifically conferred on it by the Constitution. It is not constitutionally possible for Parliament to make laws governing every substantive issue that may arise in the exercise of federal jurisdiction.

6.17 Some matters within federal jurisdiction may properly fall within heads of federal legislative power. For example, the Commonwealth's legislative power over trade marks (s 51(xvii) of the Constitution) would underpin federal regulation of the substantive rights and liabilities in a dispute between residents of different states over the use of a trade mark. However, if a matter falls within federal jurisdiction because a contractual dispute arises between residents of different states (s 75(iv)) or because a tort claim is brought against the Commonwealth (s 75(iii)), this does not alone empower Parliament to make comprehensive laws regulating contracts or torts, such as would be necessary for the resolution of those disputes on their merits.

6.18 Moreover, even if Parliament possesses the legislative power to enact a law, it may not in fact have exercised that power. There remain substantial reservoirs of unused legislative power, the magnitude of which has varied from time to time. It is arguable, for example, that Parliament possesses the power to regulate procedural matters that arise in the exercise of federal jurisdiction, whether they are adjudicated in state or federal courts. Yet, as the cases discussed later in this Chapter demonstrate, there are many procedural issues about which federal law is silent.

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13 An example is the choice of law rule in torts which, prior to the decision in *John Pfeiffer Pty Ltd v Rogerson*, placed heavy emphasis on the law of the forum in determining the legal consequences of a tort alleged to have been committed outside the forum.

6.19 Accordingly, in many matters of federal jurisdiction there will be gaps in federal law, either because federal law cannot constitutionally provide the relevant legal principles or because it does not do so in practice. If all legal issues in dispute between the parties are to be resolved, it is necessary to fill the gaps by reference to some other body of law. The question then becomes: to which legal system does the court refer in filling the gaps?

6.20 The need to select a body of law to fill the gaps has often resulted in recourse to the convenient expression ‘choice of law in federal jurisdiction’, but the choice in question is fundamentally different from that involved in a regular conflict of laws case. In the regular case, choice of law rules serve the function of selecting between two or more systems of law, each of which has some claim to application by virtue of the connections between that system and the factual circumstances of the case. In relation to federal jurisdiction, however, there is generally no competition between federal law and another law, based on the closeness of connection. The problem is rather that federal law requires supplementation by reference to some other body of law because the case requires resolution of legal issues for which federal law makes no relevant provision. This problem arises irrespective of whether the dispute has factual connections with more than one state or territory. This has led the High Court to observe recently that ‘in federal jurisdiction, the question is not so much a question as to choice of law, but identification of the applicable law’.<sup>14</sup>

6.21 The second reason for complexity arises from the difficulty in identifying the relevant choice of law rules, properly so-called, when dealing with those cases in federal jurisdiction that do in fact have factual connections with more than one state or territory. Federal choice of law rules might provide these rules but, as mentioned above, there is currently no body of choice of law rules designed specifically for use by courts when exercising federal jurisdiction.

6.22 In 1992 the Commission recommended that Parliament enact statutory choice of law rules for all courts exercising federal jurisdiction, but these proposals remain largely unimplemented. In *Commonwealth v Mewett*, Gaudron J discussed the judicial creation of common law choice of law rules for federal jurisdiction, based on the notion that in federal jurisdiction there is a ‘need to ensure that the one set of facts occurring in Australia gives rise to only one possible legal consequence, regardless of the location of the court in which the proceeding are brought’.<sup>15</sup> However, more recently in *John Pfeiffer Pty Ltd v Rogerson*<sup>16</sup> the High Court has stated that the common law choice of law rules with respect to torts, limitation statutes and questions of quantification of damages apply equally in state and federal jurisdiction.

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14 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, 638.

15 (1997) 191 CLR 471, 527.

16 (2000) 172 ALR 625.

6.23 The absence of special federal choice of law rules, whether based in statute or the common law, necessitates recourse to a body of law to fill that gap. The question here is: to which legal system does the court refer to supply choice of law rules for matters of federal jurisdiction that have factual connections with more than one state or territory?

## Approaches to reform

6.24 The previous discussion suggests several possible directions for reform of the law applicable in federal jurisdiction. The matters listed below are not necessarily mutually exclusive, and several options may be explored in conjunction with each other.

### Expand federal laws on substantive matters

6.25 The first option is to extend the range of substantive matters that are subject to federal law. One advantage of this approach is that, in respect of those matters covered by federal law, there is uniformity between all courts exercising federal jurisdiction in Australia, regardless of whether they be federal, state or territory courts. On the other hand, as previously discussed, it is not constitutionally possible for federal law to cover every substantive issue that might arise in federal jurisdiction, so that reliance on some body of law other than federal law can never be wholly excluded.

6.26 There have been some changes in this direction. For example, in 1984 the High Court and the Federal Court were given, for the first time, the power to award interest from the date a cause of action accrues until the date of judgment, whereas previously these Courts had to rely on the application of state law through the operation of s 79 JA.<sup>17</sup> The application of limitation statutes to claims in federal jurisdiction has also been problematic and might be amenable to general regulation by federal law. Some federal statutes contain their own limitation periods and it is possible that such an approach might be adopted more widely.<sup>18</sup>

6.27 In pursuing this option it ought to be borne in mind that many issues that were once considered to be procedural (such as awarding interest on damages, and limitation statutes) are now properly regarded as substantive because of the effect they have on the outcome for the parties.<sup>19</sup> This revised classification may itself make federal regulation constitutionally more difficult because Parliament's power to regulate procedural matters in the exercise of federal jurisdiction is likely to be

17 s 77MA(1)(a) JA (High Court); s 51A FCAA (Federal Court).

18 See eg *Trade Practices Act 1974* (Cth) s 82(2), imposing a three year limitation period for actions for recovery of loss or damage caused by a contravention of Pt IV or Pt V of the Act. A Bill currently before Parliament, the *Trade Practices Amendment Bill* (No 1) 2000, proposes to extend this to six years.

19 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

more extensive than its power to regulate matters of substance. Regulation of procedure may properly be regarded as ‘incidental’ to the exercise of federal judicial power (s 51(xxxix)), whereas regulation of substantive matters may require an independent head of power under s 51 of the Constitution.

### **Expand federal laws on procedure**

6.28 A second option is to extend the range of procedural matters that are subject to federal law by regulating procedure in federal courts or, more widely, the procedure in all courts exercising federal jurisdiction. This would give the same advantage of uniformity (either among federal courts, or across all courts exercising federal jurisdiction), possibly without the constitutional impediments relevant to the regulation of substantive law.

6.29 Steps have been taken in this direction in recent years, for example by the *Evidence Act 1995* (Cth), which sets out a comprehensive code on the law of evidence for all federal courts in Australia.

### **Enact federal choice of law rules**

6.30 A third option is to enact comprehensive choice of law rules for courts exercising federal jurisdiction, as the Commission recommended in ALRC 58. By providing its own choice of law rules in matters of federal jurisdiction, Parliament would avoid reliance on the common law or on various written laws of the states or territories.

6.31 Parliament made some moves in this direction in enacting special choice of law rules in 1987 for courts exercising jurisdiction pursuant to the national scheme for the cross-vesting of jurisdiction.<sup>20</sup> The enactment of federal choice of law rules may be done in conjunction with an extension of substantive or procedural federal laws, as mentioned above.

### **Rely on state and territory laws**

6.32 A fourth approach is to rely exclusively on the application of state and territory laws in matters of federal jurisdiction, whether these laws be substantive, procedural, or choice of law rules.

6.33 Under this alternative it is necessary for federal law to identify some criterion by which a *particular* state or territory is chosen for the purpose of applying its laws to resolve the legal issues arising in federal jurisdiction. The traditional approach, which is adopted in s 79 JA, is to select the laws of the state

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20 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 11, and cognate state and territory legislation.

or territory in which federal jurisdiction is being exercised. The policy behind this approach is that uniformity of outcome should be achieved between all courts exercising jurisdiction in the one state or territory, irrespective of whether those courts are exercising state or federal jurisdiction. However, this comes at the cost of imposing disunity in the exercise of federal jurisdiction across different states or territories in Australia.

6.34 Reliance on the laws of the state or territory where jurisdiction is being exercised is by no means an inevitable choice. The cross-vesting legislation, for example, provides two alternatives to the mechanical application of the law of the state or territory where the court exercises federal jurisdiction. Section 11(1)(b) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) states that if the matter ‘is a right of action arising under a written law of another State or Territory, the court shall, in determining that matter, apply the written and unwritten law of that other State or Territory’. The law so applied clearly need not be that of the state or territory in which jurisdiction is being exercised. Even more liberally, s 11(1)(c) of the Act authorises a court exercising cross-vested jurisdiction to apply such rules of evidence and procedure as it ‘considers appropriate in the circumstances’, provided the rule is one applied in a superior court in Australia or an external territory. This approach moves away from the rigid application of the law of the place at which federal jurisdiction is exercised in favour of greater judicial discretion in selecting the applicable law.

6.35 If reliance were to be placed on state or territory laws, yet another approach would be to pick up the laws in force in one particular state or territory. This approach is adopted, albeit in a different context, in relation to the non-self-governing territories, whose laws are generally stated to be those in force in a proximate state or territory. It is on this basis that Commonwealth law provides that the law in force in Western Australia applies in two Commonwealth territories, the law in force in the ACT applies in four other territories, and the law in force in the Northern Territory applies in one other territory (see Chapter 7). Where the ‘host’ jurisdiction is a Commonwealth territory, as in the ACT and Northern Territory examples, the Commonwealth Parliament possesses plenary legislative power, pursuant to s 122 of the Constitution, to enact substantive, procedural, or choice of law rules for the government of the host territory. It does not necessarily follow, however, that all laws in force in the host territory can be picked up and applied in any state court exercising federal jurisdiction. Such a law would not be a law for the government of a territory, although it might be supported by other constitutional heads of power.

### **Combine federal, state and territory laws**

6.36 A fifth approach is to rely on a combination of state, territory and federal laws for the purpose of supplying the rules necessary for the resolution of a matter within federal jurisdiction. This is the current position under sections 79 and 80 JA



in so far as the sections speak of the application of state law or territory law, 'except as otherwise provided by the laws of the Commonwealth' or 'so far as the laws of the Commonwealth are not applicable'.

6.37 The difficulty with this combined model is that it is difficult to cast a provision in a way that adequately defines the relationship between the potentially applicable state, territory and federal laws. The complex and often conflicting judicial decisions on the interpretation of sections 79 and 80 are evidence of the confusion that can arise when federal law must be supplemented in order to resolve legal questions arising within federal jurisdiction.

### **Rely on the Australian common law**

6.38 Finally, one approach to these issues is to acknowledge the role of the common law in supplying substantive laws, procedural laws, and choice of law rules, irrespective of the enactments of any Australian legislature.

6.39 Recent jurisprudence of the High Court has held that there exists a uniform common law in Australia, rather than separate common law systems in each of the states and territories.<sup>21</sup> The rationale for this view is that the Australian colonies inherited the same body of common law from England and have always been subject to judicial correction by an ultimate appellate court. Prior to federation, that court was the Privy Council and after federation it was, for a time, the Privy Council and the High Court. Since the passage of the *Australia Act 1986* (Cth) it is the High Court alone. Consequently, it is said that there is a single common law operating throughout Australia, whatever the court or the nature of the jurisdiction it exercises.

6.40 A number of academic writers<sup>22</sup> and judges<sup>23</sup> have strongly supported this view, although there have been dissentients, most notably Priestley J of the New South Wales Court of Appeal.<sup>24</sup> Priestley J has argued that the Australian colonies did not receive a single body of common law from England but received English law at different stages depending upon their date of settlement. Moreover, in his Honour's view, while it is true that all Australian courts are now subject to correction by the High Court, until such correction occurs in a particular case, the possibility exists of divergence in the common law as between individual states and territories.<sup>25</sup>

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21 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

22 Z Cowen 'Diversity jurisdiction: The Australian experience' (1955–6) 7 *Res Judicatae* 1, 29–30; M Pryles & P Hanks *Federal conflict of laws* Butterworths Sydney 1974, 160; B O'Brien 'Choice of law in federal jurisdiction (Part 2)' (1977) 2 *University of New South Wales Law Journal* 46, 57–58, 60.

23 O Dixon 'Sources of legal authority' in Woinarski (ed) *Jesting Pilate* 2<sup>nd</sup> ed William S Hein & Co 1997, 200–201; *Commonwealth v Mewett* (1997) 191 CLR 471 (Gaudron J).

24 L Priestley 'A federal common law for Australia?' (1995) 46 *South Carolina Law Review* 1043.

25 *id.*, 1048, 1065–6. The expanding role of intermediate appellate courts in law-making in Australia is discussed in Ch 4.

6.41 While Priestley J's view has force, it appears to overstate both the differences that exist between the laws of the states and territories and the differences between the English common law inherited by the colonies at different times in the 18<sup>th</sup> and 19<sup>th</sup> centuries. Quite apart from the role of the High Court in facilitating uniformity, comity in judicial decision making has operated as a powerful tool within the Australian court system to limit the disagreement between courts on common law matters.

6.42 In any event, as the High Court has now accepted the single common law view, any discussion of the law applicable in federal jurisdiction must proceed on this basis. The significance of a unified Australian common law in the present context is that it may provide a body of law (whether on substantive, procedural, or choice of law issues) that is not tied to a particular tier of government. Its national character, and its utility in resolving legal issues arising in federal jurisdiction, may explain its resurgence in the High Court's recent decisions on sections 79 and 80 (see paragraphs 6.123–6.142). However, the common law of Australia cannot itself solve those choice of law problems that require the application of statute law. Where the common law is modified by a relevant state or territory Act, the Act will prevail over the common law.

**Question 6.1.** To what extent should cases involving the exercise of federal jurisdiction be resolved by reliance on

- ?? substantive federal laws
- ?? procedural federal laws
- ?? federal choice of law rules
- ?? state and territory laws (whether substantive, procedural, or choice of law)
- ?? a combination of federal, state and territory laws, or
- ?? the common law of Australia?

## **Constitutional power and the scope of Commonwealth regulation**

6.43 The power of the Commonwealth to legislate with respect to the law applicable in federal jurisdiction operates as an important constraint on any proposed reform of this area. These legislative powers may vary according to

- ?? the type of legislation in question (substantive, procedural, or choice of law)
- ?? the court in which the jurisdiction is exercised, being a federal, state or territory court, and
- ?? the type of jurisdiction invoked, namely federal, state or territory jurisdiction.

6.44 At one end of the spectrum, Parliament has undoubted power to regulate the procedure of federal courts when exercising federal jurisdiction. At the other end, the power of Parliament to regulate substantive matters in state courts exercising federal jurisdiction may be subject to significant constraints.

6.45 This section briefly surveys the constitutional basis for the Commonwealth Parliament's regulation of the law applicable in federal jurisdiction. The principal arguments have revolved around whether Parliament may legislate pursuant to the territories power (s 122), the recognition of laws power (s 51(xxv)) or the incidental power (s 51(xxxix)).

### **Territories power (s 122)**

6.46 Section 122 of the Constitution confers on Parliament the power to 'make laws for the government of any territory' (see Chapter 7). In exercise of this power, the Commonwealth has undoubted competence to lay down substantive, procedural and choice of law rules to be applied in courts of the territories. This power would also presumably extend to laying down the choice of law rules applicable in other Australian courts in so far as those rules require the application of territory law to a particular case before the other court.

6.47 The reason for the Commonwealth's expansive power in this context is because s 122 has been accepted as a plenary power for the government of the territories, subject only to a requirement that there be a sufficient nexus between the law and the territory. For example, in *Spratt v Hermes*<sup>26</sup> Barwick CJ said that s 122

is not only plenary but is unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory ... This is as large and universal a power of legislation as can be granted.

### **Recognition of laws power (s 51(xxv))**

6.48 Section 51(xxv) of the Constitution grants Parliament power to make laws with respect to 'the recognition throughout the Commonwealth of the laws, the public Acts and records and judicial proceedings of the states'.

6.49 This section has been subject to surprisingly little judicial consideration. It is arguable that choice of law rules fall within the terms of the section because they determine, in a particular court, whether rights arising under the laws of some other jurisdiction are to be recognised in the forum. In *Breavington v Godleman*, Mason CJ took an expansive view of the section's potential in commenting that

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26 (1965) 114 CLR 226, 242.

If any provision of the Constitution is to be regarded as the source of a solution to inter jurisdictional conflicts of laws problems within Australia, it is perhaps s 51(xxxv).<sup>27</sup>

6.50 In its Discussion Paper on *Choice of Law Rules* (ALRC DP 44), the Commission expressed a similarly positive view in the following terms.

The Commission's view is that the 'recognition' of laws clearly encompasses choice of law rules and that the enactment of choice of law rules applicable throughout Australia in reliance on s 51(xxv) would be a valid exercise of Commonwealth power. Indeed it appears that the Commonwealth has already enacted such a rule in the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 11(1)(b).<sup>28</sup>

6.51 In its final report (ALRC 58) the Commission reiterated this view, but in the end preferred a more cautious approach suggested by a number of consultants. Accordingly, the Commission recommended parallel uniform legislation — the federal component dealing with choice of law in federal courts, territory courts, and state courts exercising federal jurisdiction, and the state component dealing with choice of law in state courts exercising state jurisdiction.<sup>29</sup>

6.52 The views of some other bodies have echoed the Commission's caution in taking a robust approach to s 51(xxv). In 1988, the Constitutional Commission acknowledged some uncertainty about the issue and recommended the insertion into the Constitution of a new head of power (s 51(xxvA)), giving the federal Parliament power to make laws with respect to 'principles of choice of law'. The Constitutional Commission also recommended the explicit extension of s 51(xxv) to the territories.<sup>30</sup>

6.53 The Commission presently shares the view expressed in ALRC DP 44, namely, that s 51(xxv) authorises the Commonwealth Parliament to enact federal choice of law rules throughout Australia, whether the court that applies them exercises federal or state jurisdiction. However, for present purposes it is not necessary to go that far — the Commission's current terms of reference ask only that the Commission address the law applicable in the exercise of federal jurisdiction.

### Chapter III and the incidental power in s 51(xxxix)

6.54 Chapter III of the Constitution confers considerable legislative power on Parliament with respect to the federal judicial system. It may be argued that Commonwealth power to create choice of law rules, and to regulate procedure in

27 (1988) 169 CLR 41, 83 (Mason CJ).

28 Australian Law Reform Commission Discussion Paper 44 *Choice of law rules* Sydney 1990, para 1.10 (ALRC DP 44).

29 ALRC 58, para 3.25–3.26.

30 Constitutional Commission *Final Report* AGPS Canberra 1988.

courts exercising federal jurisdiction, exists by virtue of sections 71 and 77 of the Constitution, either on their own account or in combination with the incidental power in s 51(xxxix) of the Constitution. The argument is that Parliament's power to create federal courts (s 71), to confer federal jurisdiction on federal courts (s 77(i)) and to invest state courts with federal jurisdiction (s 77(iii)) includes the incidental power to regulate both choice of law and procedure in the exercise of federal jurisdiction. To the extent that the incidental power is not already implicit in the grant of power in sections 71 and 77, it is supplemented by s 51(xxxix).

6.55 The High Court has stated that the Commonwealth has power under Chapter III of the Constitution, when investing state courts with federal jurisdiction, to control the nature of such jurisdiction, including the manner and exercise of any rules of procedure for the hearing of a matter.<sup>31</sup> Thus, it has been remarked that those sections of the *Judiciary Act* that presently regulate the law applicable in federal jurisdiction (namely, sections 79 and 80 JA) are supported by s 51(xxxix) of the Constitution, as an incident of the power to invest federal jurisdiction in federal and state courts.<sup>32</sup>

6.56 However, reliance on the incidental power carries important limitations. In *Re Wakim; Ex parte McNally*, the High Court stated that the incidental power may be used to support legislation that assists or makes effective the exercise of the principal power provided that no addition or creation of new powers occurs.<sup>33</sup> Some commentators have expressed doubts about over-extending the reach of the incidental power in this respect. Pryles and Hanks, for example, remark that

The notion that power to legislate in relation to federal jurisdiction does not by itself confer power to legislate in respect of the law to be applied in that jurisdiction carries some persuasion and cannot be lightly dismissed.<sup>34</sup>

6.57 The Commission has previously noted the doubts of some commentators as to whether the incidental power 'could stand the weight of a near codification of choice of law'.<sup>35</sup> The Commission's initial view is that the incidental power, operating on Chapter III, would support federal legislation enacting choice of law rules for federal courts and for state courts exercising federal jurisdiction. It would also support federal legislation enacting rules of procedure for federal and state courts exercising federal jurisdiction, provided those rules conform with the High Court's restricted understanding of what is 'procedural',<sup>36</sup> and do not purport to

31 *Russell v Russell* (1976) 134 CLR 495, 506 (Barwick CJ), 519 (Gibbs J); 530 (Stephen J); 536 (Mason J); 554 (Jacobs J).

32 ALRC 58, 25, citing B O'Brien 'The law applicable in federal jurisdiction Part 2: The application of common law to federal jurisdiction' (1977) 2 *University of NSW Law Journal* 46.

33 *Re Wakim; Ex parte McNally* (1999) 163 ALR 270, 280 (Gleeson CJ), 293–4 (McHugh J), 307 (Gummow and Hayne JJ, with whom Gaudron J agreed).

34 M Pryles & P Hanks *Federal conflict of laws* Butterworths Sydney 1974, 173.

35 ALRC 58, 25.

36 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

reach beyond the limited class of matters relating to the mode or conduct of court proceedings. When investing state courts with federal jurisdiction, Parliament cannot interfere with the structure or organisation of state courts (see Chapter 2). However, regulation of state court procedure in matters of federal jurisdiction would not appear to transgress this principle.

6.58 It would appear that the incidental power could not support federal legislation stipulating choice of law rules applicable by state courts exercising state jurisdiction, since such laws would not make effective the exercise of *federal* judicial power. Similar reasoning was applied by Gummow and Hayne JJ in *Re Wakim; Ex parte McNally*,<sup>37</sup> to reject the contention that the incidental power supported a Commonwealth law that consented to the conferral of state jurisdiction on federal courts. It was said that such a law might make the exercise of state jurisdiction more effective, but that it could not be said to enhance the effectiveness of federal jurisdiction.

6.59 If the incidental power were the only source of power to enact choice of law rules, Parliament's lack of power to enact choice of law rules in the exercise of state jurisdiction would result in disunity in choice of law rules within Australia. It was precisely this reason that influenced the High Court in *John Pfeiffer Pty Ltd v Rogerson*<sup>38</sup> to propose that any new common law choice of law rules developed by the courts be expressed to apply to both state and federal jurisdiction.

**Question 6.2.** How far should Parliament seek to exercise its constitutional powers in legislating with respect to substantive law, procedural law or choice of law rules in federal courts, territory courts, or state courts exercising federal jurisdiction?

## Origins of sections 79 and 80 of the *Judiciary Act*

6.60 Section 79 JA is in the following terms

The laws of each State or Territory, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

6.61 Apart from the addition of the reference to territories in 1979,<sup>39</sup> the section is in the same form in which it was enacted in 1903.

<sup>37</sup> (1999) 163 ALR 270.

<sup>38</sup> id, 650.

<sup>39</sup> *Judiciary Act (Amendment) Act (No 2) 1979* (Cth) s 14.

## 6.62 Section 80 provides

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

6.63 Apart from the addition of the reference to territories in 1979, and the substitution of ‘common law of Australia’ for ‘common law of England’ in 1988,<sup>40</sup> this section too is in the same form in which it was enacted in 1903.

6.64 Section 80A extends sections 79 and 80 to suits against the Commonwealth in territory courts.

6.65 Sections 79, 80 and 80A have traditionally performed the function of directing federal, state and territory courts which law to apply when those courts are exercising federal jurisdiction. Unfortunately, these provisions have been subject to both conflicting judicial opinion and critical academic commentary. For example, Sykes and Pryles comment that ‘it is difficult to discern the relationship between [the two provisions] ... in fact they have a prima facie appearance of being to some extent inconsistent’;<sup>41</sup> while Nygh notes that, ‘at first sight the provisions are somewhat puzzling’.<sup>42</sup>

6.66 The first draft of the *Judiciary Act* was written by Sir Samuel Griffith, who was well aware of United States law on the subject.<sup>43</sup> Sections 79 and 80 were closely modelled on provisions of United States law. In particular, s 79 JA was based on s 34 of the *Judiciary Act 1789* (US), which by 1903 had become s 721 of the United States Revised Statutes. Section 80 JA was based on s 3 of the *Civil Rights Act 1866* (US), which by 1903 had become s 722 of the United States Revised Statutes. Both provisions survive in modified form in United States law today.<sup>44</sup> The closeness of the parallel between the Australian and United States provisions can be seen in s 34 of the *Judiciary Act 1789* (US), which provided

The laws of the several states, except where the constitution, treaties or statutes of the United states shall otherwise require or provide, shall be regarded as rules of decision in trials at common law or in the courts of the United states in cases where they apply.

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40 *Judiciary Act (Amendment) Act 1979* (Cth) s 15; *Law and Justice Amendment Act 1988* (Cth).

41 E Sykes & M Pryles *Australian private international law* 3<sup>rd</sup> ed LBC Sydney 1991, 308.

42 P Nygh *Conflict of laws in Australia* 6<sup>th</sup> ed Butterworths Sydney 1995, 77.

43 L Priestley ‘A federal common law for Australia?’ (1995) 46 *South Carolina Law Review* 1043, 1052.

44 See 28 USC s 1652 (formerly s 721) and 42 USC s 1988 (formerly s 722).

6.67 While this provision does not appear to have been subjected to the same scrutiny as its Australian counterpart, United States courts have followed the philosophy underlying this section, at least in diversity suits.<sup>45</sup> In the well-known decision of the United States Supreme Court in *Erie Railroad v Tompkins*<sup>46</sup> it was held that in diversity suits a federal court must apply the laws of the state in which it sits, including that state's common law.<sup>47</sup> The federal court must also interpret the state law in the same manner in which courts of the relevant state have interpreted it. Since in the United States each state has its own common law, and as the United States Supreme Court does not possess appellate jurisdiction in respect of state law, *Erie*'s reliance on state common law in federal courts was said to preclude the creation of a 'federal common law'. In the later decision of *Klaxon Co v Stentor Electric Manufacturing Co*<sup>48</sup> the Supreme Court applied *Erie* to require federal courts in diversity suits to apply the choice of law rules of the state in which they sit.

6.68 The rationale of the *Erie/Klaxon* doctrine is that uniformity of outcome should be sought as between all courts exercising jurisdiction within the same geographical area. However, outside the context of diversity jurisdiction, United States decisions reveal that more flexibility exists with respect to the adoption of state laws by courts exercising federal jurisdiction. In particular, federal courts have continued to fashion federal common law rules on an ad hoc basis in a variety of circumstances. One such circumstance is where national uniformity, as opposed to uniformity within a state, is considered desirable.<sup>49</sup> This development has occurred, for example, in 'federal question' cases, that is, where the interpretation of a federal statute is involved and an issue arises that is not covered by the federal law in issue.

6.69 One question to be considered in this reference is the relevance of the American experience to Australia. The scope for United States federal courts to create federal common law rules to fill gaps in the applicable law illustrates that uniformity of outcome as between courts in the same state is not the only objective of this aspect of the law of federal jurisdiction — national uniformity (through the creation of federal common law) and the protection of federal interests may also be desirable. It may be argued that, in the Australian context, an even stronger case may be made for national uniformity of outcome in federal jurisdiction because of the existence of a single common law for Australia. This concern is revealed in the following observation of Gaudron J.

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45 'Diversity suits' are those in which federal jurisdiction is based on the diversity of residence of the parties. For the Australian equivalent, see s 75(iv) of the Constitution.

46 304 US 64 (1938).

47 The decision overruled *Swift v Tyson* 41 US (16 Pet) 1 (1842), which had held that s 34 of the *Judiciary Act 1789* required the application of state constitutions and statutes, but not state common law.

48 313 US 487 (1941).

49 See discussion in M Pryles & P Hanks *Federal conflict of laws* Butterworths Sydney 1974, 153; *United States v Kimball Foods Inc* 440 US 715 (1979).



State courts, when exercising federal jurisdiction 'are part of the Australian judicial system created by Chapter III of the Constitution and, in that sense and on that account, they have a role and existence which transcends their status as courts of the states'.<sup>50</sup>

**Question 6.3.** United States courts have recognised that national uniformity and protection of federal interests are desirable objectives in some instances of federal jurisdiction. Given the greater unification of the Australian judicial system, should national uniformity be a goal in the exercise of federal jurisdiction in Australia? What lessons can be learned from the United States experience?

## Interpretation of section 79

6.70 How have Australian courts interpreted s 79 JA? Until recently, there was a clear approach adopted, which may be described as the 'traditional position'.<sup>51</sup> Under this view, s 79 is the key provision and the one to which reference should first be made. According to this approach,

the purpose of [s 79] is to adopt the law of the state where federal jurisdiction is exercised as the law by which, except as the Constitution or federal law may otherwise provide, the rights of the parties to the lis are to be ascertained and matters of procedure are to be regulated.<sup>52</sup>

6.71 Two main conclusions can be drawn from this statement.<sup>53</sup> First, s 79 applies to select both substantive and procedural laws. Second, the state or territory in which the court exercises federal jurisdiction becomes a 'surrogate forum' whose common law and statute law applies, unless excluded by the Constitution or Commonwealth legislation. Both observations require further comment in light of more recent developments. This section also examines other interpretational problems that have arisen in relation to s 79.

## Procedural law and substantive law

6.72 It is not obvious that the opening words of s 79, namely, 'the laws of each State, including the laws relating to procedure, evidence and the competence of witnesses' should encompass substantive matters as well as procedural matters. It

50 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 citing her judgment in *Leeth v Commonwealth* (1992) 174 CLR 455, 498–499.

51 P Nygh 'Choice of law in federal and cross-vested jurisdiction' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 335, 338–340.

52 *Commissioner of Stamp Duties (NSW) v Owens (No 2)* (1953) 88 CLR 168, 170 (Dixon J).

53 P Nygh 'Choice of law in federal and cross-vested jurisdiction' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 335, 339.

is acknowledged that the word ‘including’ is used, which would not necessarily preclude the selection of other types of laws. However, it is also arguable that the reference to ‘procedure, evidence and the competency of witnesses’ creates a class of procedural matters, which controls the interpretation of the preceding words ‘the laws of each State’. This view has been accepted by at least one member of the High Court<sup>54</sup> and by some academics<sup>55</sup> but is yet to achieve general judicial endorsement.

6.73 By contrast, the general approach of courts has been to apply s 79 to pick up both procedural<sup>56</sup> and substantive matters<sup>57</sup> without distinction. Some judges have explicitly stated that the provision applies to both issues.<sup>58</sup> Issues to consider in this reference are whether it would be clearer to limit the operation of s 79 to procedural matters and leave s 80 to apply to substantive matters and whether, if s 79 is to have an extended operation, to make this explicit in the section.

**Question 6.4.** Should section 79 of the *Judiciary Act* be amended so that it applies to procedural matters only, thus leaving section 80 of the *Judiciary Act* to apply to substantive matters?

**Question 6.5.** Alternatively, should section 79 of the *Judiciary Act* be amended to expressly apply to both procedural and substantive matters?

## Common law and statutory law

6.74 Another issue to consider is whether s 79 JA picks up both statutory and common law. The broad statement of Dixon J in *Commissioner of Stamp Duties (NSW) v Owens (No 2)*,<sup>59</sup> set out at paragraph 6.70, suggests that it does. However, given the acceptance by the High Court of the view that Australia has a single

54 *Commonwealth v Mewett* (1997) 191 CLR 471, 492–3 (Brennan CJ).

55 P Nygh ‘Choice of law in federal and cross-vested jurisdiction’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 335, 340–341.

56 *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd (in liq)* (1999) 96 FCR 217, 226–227 and *Smith v Australian National Line Ltd* (1998) 159 ALR 431, 452 (limitation of actions); *Bell Group Ltd v Westpac Banking Corp* (2000) 173 ALR 427 (leave to proceed against a company in liquidation); *Bass v Permanent Trustee Co Ltd* (1999) 161 ALR 399 and *Solomons v District Court of New South Wales* [2000] NSWCA 99 (statutory assistance with costs for defendants); *Northern Territory v GPO* (1999) 196 CLR 553 (obligation on statutory officer to produce documents in court); *Bailey v Manos* (unreported) Federal Court 6 May 1992 (von Doussa J) (documents liable to stamp duty inadmissible in court if not stamped).

57 *Austral Pacific Group Ltd v Airservices Australia* [2000] HCA 39; *Matthews v ACP Publishing Pty Ltd* (1998) 87 FCR 152, 160–161 (damages under the NSW equivalent of the *Lord Cairns Act*).

58 *Solomon v District Court of NSW* [2000] NSWCA 99, para 11 (Mason P); para 81 (Foster AJA); *Metropolitan Health Services Board v Australian Nursing Federation* (1999) 94 FCR 132, 134–136 (Lee J).

59 (1953) 88 CLR 168, 170 (Dixon J).

common law, the expression ‘the law of each State’ in s 79 seems inappropriate to include reference to the common law. It is certainly ambiguous, possibly meaning either (a) the common law of Australia and (b) any statutory departures from that law by the state in question, or simply (b) alone.

6.75 As discussed in paragraphs 6.123–6.132, some members of the High Court have used the idea of the single Australian common law to exclude common law from the ambit of s 79 and place it instead within s 80.<sup>60</sup> In other words, the picking up of common law rules in federal jurisdiction is effected by s 80 not s 79. The consequence of this interpretation for s 79 is to limit its scope to picking up state or territory statutes. An issue for consideration in this reference is whether to amend s 79 consistently with this approach, for example, by altering ‘the law of each State’ to read the ‘statutory law of each State’.

6.76 Whichever view is taken, it is arguable that the current wording of s 79 ought to be amended. If s 79 is not intended to encompass the common law, the section might be amended to indicate that its application is confined to state statutory law. If s 79 is intended to encompass the common law, the section might be amended to reflect the prevailing view that the section picks up the common law of Australia, as in force in a state, rather than the common law of the state.

6.77 If s 79 applies to pick up both statutory and common law rules of a state or territory, it should be noted that the law applied will include the common law choice of law rules in force in that state. Such rules might select the law of the forum or the law of another place. They will also pick up any mandatory rules of the forum and any state statutory choice of law rules that override the common law choice of law rules.

6.78 The application of common law choice of law rules under s 79 can be seen from the case of *Musgrave v Commonwealth*.<sup>61</sup> That case concerned an action brought against the Commonwealth in the High Court based on an alleged defamatory statement made in Queensland. The action was commenced and heard in Sydney and the majority held that under s 79, the law of New South Wales would be applied, including that State’s common law choice of law rules. Under the then applicable choice of law rule in torts, the principle in *Phillips v Eyre*,<sup>62</sup> the law of the forum (New South Wales) applied subject to showing that the tort was ‘not justifiable’ under the law of the place of the wrong (Queensland). Since there was a defence to liability under Queensland law, justification was shown under the law of the place of the wrong and so the action failed.

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60 *Commonwealth v Mewett* (1997) 191 CLR 471, 522 (Gaudron J).

61 (1937) 57 CLR 514.

62 (1870) 6 LR QB 1.

**Question 6.6.** Should section 79 of the *Judiciary Act* be expressed to apply to both common law and statutory law? If so, should the section be amended to refer to the common law of Australia as in force in a particular state? If not, should the section be amended to indicate that it picks up only the statutory law of a state?

### Relevant and irrelevant laws

6.79 Section 79 picks up state laws and applies them ‘in all cases to which they are applicable’. One issue arising from this phrase is which state laws are picked up by s 79. It has been stated that s 79 can only attract local law to the extent that such law resolves the rights of the parties to the case or provides the relevant procedural rules to that end. It follows that other provisions of state or territory law, which are not directly pertinent to the resolution of the matter before the court, are not attracted. For example, in *Commissioner of Stamp Duties (NSW) v Owens (No 2)*<sup>63</sup> the High Court had to consider whether a New South Wales statute, which provided for financial assistance to parties in appellate proceedings,<sup>64</sup> applied to an action in federal jurisdiction. The court found that such a law, not being directly related to the resolution of the issues in dispute in the case, fell outside s 79.

6.80 A similar result was reached in a recent decision of the New South Wales Court of Appeal in *Solomons v District Court of NSW*.<sup>65</sup> That case involved an applicant who was tried and acquitted in a state court for offences under a Commonwealth statute. The question arose as to whether a New South Wales statute, which provided for financial assistance to persons acquitted of offences, applied in the exercise of federal jurisdiction. The court, by majority, found that the New South Wales statute was not picked up by s 79. According to Foster AJA, this conclusion followed because the provision ‘did not form part of the adjudicative process of the court in which the applicant was tried for the particular offence’.<sup>66</sup> In other words, the provision was not directly related to the resolution of the substantive issues in the case.

6.81 One difficulty with this interpretation of s 79 is that it defeats the object of ensuring uniform treatment of all cases in state courts, regardless of whether state or federal jurisdiction is being exercised. In the *Solomons* case a different result would have been obtained if the New South Wales court had been applying a New South Wales statute. A further practical difficulty is that it may be difficult to ascertain which state laws are sufficiently connected with the adjudicative process to attract the operation of s 79.

<sup>63</sup> (1953) 88 CLR 168.

<sup>64</sup> *Suitors Fund Act 1951* (NSW).

<sup>65</sup> [2000] NSWCA 99.

<sup>66</sup> *id.*, para 99.

**Question 6.7.** Should section 79 of the *Judiciary Act* be expressed to pick up only those state laws that are relevant to the disposition of the matter before the court? If so, what test of relevance or nexus should be adopted to separate state laws that are picked up from those that are not?

### Laws picked up with meaning unchanged

6.82 Another aspect of whether state and territory laws are picked up in federal proceedings and applied ‘in all cases to which they are applicable’ concerns the scope and ambit of the local laws themselves. In *Pedersen v Young*, Kitto J stated that s 79 ‘does not purport to do more than pick up state laws with their meaning unchanged’.<sup>67</sup> As has been noted, if this statement is read literally, it would mean that no state statute that was expressed to apply to the courts of that state could ever apply in federal jurisdiction.<sup>68</sup> Such a result would severely narrow the available field of state laws and restrict the capacity of s 79 to utilise state law as a surrogate federal law when federal jurisdiction is being exercised.

6.83 To overcome the effects of this approach, Mason J made the following suggestion in *John Robertson and Co Ltd v Ferguson Transformers Pty Ltd*.

To ensure that state laws dealing with the particular topics mentioned in the section are applied in the exercise of federal jurisdiction by courts other than state courts, it is necessary that state laws be applied according to the hypothesis that federal courts do not necessarily lie outside their field of application. Section 79 requires the assumption to be made that federal courts lie within the field of application of state laws on the topics to which it refers, at least in those cases in which the state laws are expressed to apply to courts generally.<sup>69</sup>

6.84 While these remarks were not strictly necessary to the decision in the case, they have been applied by the Federal Court in a number of subsequent cases. Where a state statute is expressed to apply to courts generally, the assumption is made that it also applies to proceedings in federal courts. Consequently, the Federal Court has consistently held that state provisions apply to its proceedings. Examples include the power of a court to award interest on damages,<sup>70</sup> to stay court proceedings in breach of an arbitration agreement,<sup>71</sup> to make unstamped documents inadmissible in civil proceedings<sup>72</sup> and to grant leave to proceed against a company in liquidation.<sup>73</sup>

<sup>67</sup> (1964) 110 CLR 162, 165.

<sup>68</sup> P Nygh ‘Choice of law in federal and cross-vested jurisdiction’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 335, 348.

<sup>69</sup> (1973) 129 CLR 65, 95.

<sup>70</sup> *Neilsen v Hempstead Holdings Pty Ltd* (1984) 65 ALR 302, 311.

<sup>71</sup> *Bond Corp Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 193.

<sup>72</sup> *Bailey v Manos* (unreported) Federal Court 6 May 1992 (von Doussa J).

<sup>73</sup> *Grollo & Co Pty Ltd v Nu-Statt Decorating Pty Ltd* (1980) 47 FLR 44, 52; *Bell Group Ltd v Westpac Banking Corp* (2000) 173 ALR 427.

6.85 By contrast, where a state statute specifically identifies a particular state court, such as the Supreme Court of New South Wales, then s 79 does not attract the state provision.<sup>74</sup> This approach of focusing on the literal description of ‘court’ in the state statute has been criticised as ignoring the purpose of the particular provision sought to be picked up.<sup>75</sup>

6.86 The dichotomy in the treatment of state statutes that name a particular court and those that do not also appears anomalous from another perspective. Most state interpretation statutes contain a rule of interpretation that is designed to ‘localise’ general expressions so as to give them an operation that has a nexus with the state. For example, s 12(1)(b) of the *Interpretation Act 1987* (NSW) provides

In any Act or instrument: ...

(b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales.

6.87 Thus, when a New South Wales statute refers to ‘a court’, s 12(1)(b) directs that the provision be interpreted so as to relate to a court ‘in and of’ New South Wales. As a result, the difference between a state law that specifies a particular court and one that refers to ‘courts’ in general may be more apparent than real for the purpose of s 79 JA.

6.88 One possible solution is to have greater regard to the purpose of the state provision, with a view to assessing its suitability for application in the exercise of federal jurisdiction. In the case of legal aid statutes, for example, the presumption may be that the relevant state legislature did not intend to confer benefits on litigants in federal courts whereas in the case of interest on damages, because no government expenditure is involved, there is no similar state interest or concern. Such a provision should be adopted more easily in federal proceedings. There are signs of this approach in the judgment of Mason P in *Solomons v District Court of NSW*, where he found that it was not the intention of the New South Wales Parliament to extend its provisions granting assistance to persons acquitted of offences under state law to offences under federal law.<sup>76</sup>

6.89 However, this approach is unlikely to be satisfactory in all circumstances. The Commonwealth Parliament has a paramount interest in determining when a state law will be picked up and applied as surrogate federal law when a court exercises federal jurisdiction. To this end, it may not be sufficient to rely on

<sup>74</sup> *Australian National Airlines v Commonwealth* (1975) 132 CLR 582, 585–587 (Mason J); *Weiss v Barker Gosling* (1993) 16 Fam LR 728. Both cases may be compared with the decision of the Federal Court in *Matthews v ACP Publishing Pty Ltd* (1998) 87 FCR 152 where the NSW statutory equivalent of the *Lord Cairns Act* (*Supreme Court Act 1970* (NSW) s 68) was applied. This was the same statute which in *Australian National Airlines*, above, was held not to be picked up in federal jurisdiction.

<sup>75</sup> P Nygh ‘Choice of law in federal and cross-vested jurisdiction’ in B Opeskin and F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 335, 348.

<sup>76</sup> *Solomons v District Court of NSW* [2000] NSWCA 99, para 12.

indications of state legislative intent. For example, it might be supposed that a state parliament would not intend its laws to be applied in proceedings in federal courts in a way that would constitute a drain on the state purse. Yet the federal legislature, in making a law such as s 79 JA, might intend the state law to apply, notwithstanding its cost to the states, in pursuit of the goal of uniformity. It remains in issue whether the Commonwealth Parliament could validly enact legislation specifying that provisions such as these extend to federal matters.

**Question 6.8.** Should section 79 of the *Judiciary Act* be able to pick up state laws other than those that are expressed to apply in proceedings in federal jurisdiction? If so, to what extent should section 79 be permitted to alter the meaning of a state law when picking it up for the purpose of applying it to the exercise of federal jurisdiction?

**Question 6.9.** In particular, should section 79 be amended to enable state laws to be picked up regardless of whether or not they nominate a particular court or refer to state courts in general terms?

**Question 6.10.** Is it possible to devise an ‘interests analysis’ test for adoption of surrogate laws under section 79 of the *Judiciary Act*, which focuses on the subject matter of the claim and asks whether the interest of the state or territory is affected by application of the statute to federal proceedings? For example, should a matter that has no impact on the state treasury, but only affects private rights of the parties, be more easily transposed to the federal context?

### Where does a court exercise federal jurisdiction?

6.90 A difficult issue that has arisen in relation to s 79 is the effect of the place where the court is sitting on the applicable law, particularly where a proceeding has changed venue during the course of litigation (see Chapter 3). Originating process may be filed in a particular state or territory registry of a federal court, heard in another state or territory, and judgment delivered in a third place. The question that then arises is when is a court ‘exercising federal jurisdiction’ in that state or territory within the meaning of s 79.

6.91 In *Parker v Commonwealth*<sup>77</sup> Windeyer J conducted the proceedings in Victoria but delivered judgment in New South Wales. The view of counsel and, seemingly, the judge himself was that federal jurisdiction was exercised in

<sup>77</sup> (1965) 112 CLR 295.

Victoria. More recently, in *Kruger v Commonwealth*<sup>78</sup> Gaudron J suggested that federal jurisdiction is exercised by a court for the purposes of s 79 where the court ‘first sits to hear the substance of the matter, unless it is clear that the court will later sit in a state or territory more closely connected with the matter’.<sup>79</sup> This view has received the support of some academic commentators.<sup>80</sup>

6.92 The effect of a change of venue has been particularly contentious in the area of limitations statutes. For example, proceedings may originally be filed in a state within the local statutory limitation period but the subsequent hearing may be conducted in another state where the proceeding would have been statute barred if they had been commenced there. The question that arises is what limitation law applies to the proceeding: the law of the place of commencement or the law of the place of subsequent hearing?

6.93 In *Pedersen v Young*<sup>81</sup> the High Court had to consider an action in diversity jurisdiction whereby a plaintiff from New South Wales commenced proceedings against a Queensland resident in the New South Wales registry of the Court. Under the law of New South Wales, the applicable limitation period was six years, but under Queensland law it was only three years. The plaintiff’s claim was statute barred under the law of Queensland, but not by the law of New South Wales. The defendant argued that the Queensland law applied to bar the action because the tort sued upon was committed in that state. The High Court disagreed, finding that s 79 did not pick up a procedural statute of a state in proceedings commenced outside that state.

6.94 Although it was not strictly necessary to the decision, Kitto J considered what the position would have been if the matter had been heard and determined in Queensland. In his view, since the suit was commenced outside Queensland, its statute of limitations would not apply, even if the hearing occurred there.<sup>82</sup> While justices of the High Court in later cases have applied the view of Kitto J,<sup>83</sup> opinion in more recent cases has been critical, suggesting that it is the hearing of the matter rather than its commencement that more properly defines where federal jurisdiction is exercised for the purpose of s 79.<sup>84</sup>

6.95 However, it may be that these problems have been largely overcome by recent changes to the choice of law rules for procedural matters. It is arguable that the problem in *Pedersen v Young* stemmed at least in part from the fact that, until

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78 (1997) 190 CLR 1.

79 id, 139.

80 For example, P Nygh ‘Choice of law in federal and cross-vested jurisdiction’ in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 335, 350.

81 (1964) 110 CLR 162.

82 id, 165–6.

83 *Bargen v State Government Insurance Office (Qld)* (1982) 154 CLR 318, 322–324 (Stephen J).

84 *Kruger v Commonwealth* (1997) 190 CLR 1, 139–141 (Gaudron J).



recently, statutes of limitation that barred only the remedy and not the right were classified as procedural. Under common law choice of law rules, a court is required to apply the procedural law of the forum, but never applies the procedural law of another jurisdiction. Consequently, this meant that a different limitation statute could apply if the venue of the matter was altered. However, today, it is now established both under uniform state and territory legislation<sup>85</sup> and the common law<sup>86</sup> that questions of limitation are governed by the substantive law of the cause. Since this law will not automatically be the law of the forum, the same limitation period should be applied to the one set of facts wherever the matter is heard in Australia. The problem in *Pedersen v Young* could not arise today because every court that heard the matter would be bound to apply the statute of limitation in the place of the tort (Queensland) regardless of where the matter was commenced or heard.

6.96 In *John Pfeiffer Pty Ltd v Rogerson* the High Court took a restrictive view of what laws are procedural.<sup>87</sup> In the light of this, change of venue is unlikely to have any further significant impact on choice of law in federal jurisdiction.

**Question 6.11.** In the light of recent changes in the common law and statute, particularly in respect of limitation periods, is section 79 in need of reform to identify more clearly the place at which federal jurisdiction is being exercised?

**Question 6.12.** If reform is needed, should section 79 be amended to provide that the state or territory law applied in federal jurisdiction is the law of the state or territory in which the proceeding is commenced or in which the substance of the matter is heard?

### Federal laws that ‘otherwise provide’

6.97 Another issue that has arisen in the judicial decisions interpreting s 79 is the question whether another Commonwealth law excludes a particular state or territory law. In such a case s 79 does not operate to pick up the state or territory law.

### Test of irreconcilability

6.98 A question that has recently been considered is what test should be applied in determining whether a Commonwealth law ‘otherwise provides’ for the purposes of s 79. In *Northern Territory v GPAO*<sup>88</sup> the High Court, by a majority of

85 See *Choice of Law (Limitation Periods) Act 1993* (NSW) and cognate legislation in other states and territories.

86 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

87 *id.*

88 (1999) 196 CLR 553, 587–9 (Gleeson CJ, Gummow and Hayne JJ); 606 (Gaudron J).

six to one, Kirby J dissenting, took the view that the question to be asked is whether the operation of the Commonwealth law would so reduce the ambit of the surrogate federal law that the provisions of the Commonwealth law are irreconcilable with the surrogate provisions. The Court expressly rejected the view that the 'cover the field' test from the decisions on s 109 of the Constitution applied — a view that had been suggested in earlier decisions of the Court.<sup>89</sup> Arguably, the test of 'irreconcilability' comes close to the standard s 109 test of 'direct inconsistency'.<sup>90</sup>

6.99 The basis for the Court's reasoning was that, in resolving a conflict between a Commonwealth law and a surrogate federal law for the purposes of s 79, it had to be remembered that the two statutes had the same source — they are both federal laws.<sup>91</sup> By contrast, in the case of the test for inconsistency between state and federal laws under s 109 of the Constitution, the two competing laws do not emanate from the same source. Accordingly, it is appropriate that a more liberal test of exclusion applies in that context, where paramountcy is to be given to the laws of the federal legislature over those of the states. The consequence of the stricter test in relation to s 79 is that it is more difficult to displace the surrogate federal law. Notably, it was not displaced in either *Northern Territory v GPAO* or *Austral Pacific Group Ltd v Airservices Australia*.<sup>92</sup>

6.100 The *GPAO* case involved consideration of an issue that has occupied the Family Court's attention in a number of recent decisions.<sup>93</sup> Part VII FLA grants to the Family Court the power to make orders with respect to parenting and welfare of children, with the best interests of the child as the paramount consideration. Pursuant to this power, the O 28 r 1 FLR confers upon the Family Court the power to order persons to appear before the court and produce documents. However, under the statutory laws of a number of states and territories dealing with community and social welfare<sup>94</sup> or mental health<sup>95</sup> there is a provision that prevents an officer who performs duties under the state or territory statute from having to produce or disclose documents or confidential matters to 'a court'. In a number of cases involving custody disputes before the Family Court, one of the parties has sought information relating to a child or a spouse from a state or territory government department or one of its employees.

89 *De Vos v Daly* (1947) 73 CLR 509, 515 (Latham CJ), 517–518 (Starke J); *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 39 (Menzies J).

90 See *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151.

91 *Northern Territory v GPAO* (1999) 196 CLR 553, 588.

92 (2000) 173 ALR 619.

93 See *Reynolds v Kilpatrick* (1993) 16 Fam LR 601; *Y & F* [1990] FLC 92–141; *Mallia v Collins* [1993] FLC 92–423; *Piras v Thaisawat* (1993) 16 Fam LR 1003.

94 For example, *Community Welfare Act 1983* (NT) s 97(3).

95 For example, *Mental Health Act 1986* (Vic) s 120A.

6.101 The issue arising in these circumstances is whether the state or territory legislation is picked up by s 79 or whether the provisions of the *Family Law Act* or *Family Law Rules* ‘otherwise provide’. Until the High Court decision in *GPAO*, there was a conflict of authority in the Family Court. In one line of decisions it had been held that the jurisdiction of the Family Court under Part VII FLA to make orders for the welfare of children overrode any inconsistent state or territory legislation preventing disclosure of documents by statutory officers.<sup>96</sup> However, in other decisions the view was taken that the provisions of the state or territory legislation preventing disclosure should be applied.<sup>97</sup> The reasoning in the latter cases was based on the maxim of statutory interpretation, *generalia specialibus non derogant* (general things do not derogate from special things). The state and territory provisions are considered specific in nature and so prevail over the general provisions in the *Family Law Act*.

6.102 In the *GPAO* case the High Court confirmed the correctness of the latter group of decisions. This was due in part to the reasons given by the Family Court in those cases and in part to the reformulated test for determining whether a federal law ‘otherwise provides’. As discussed above, this test requires the federal law to be irreconcilable with the state or territory provisions that are picked up by s 79.

6.103 Applied to the particular statutes in issue in *GPAO*, Gleeson CJ, Gummow and Hayne JJ found that the provisions of Part VII FLA ‘leave room for the operation of the immunity conferred by the [provision of the Northern Territory Act]’.<sup>98</sup> There was no conflict between the two statutes because under the *Family Law Act* provision is made for a defence of reasonable excuse for failure to comply with an order of disclosure. In the High Court’s view, an obligation under a state or territory Act not to disclose documents to a court would be a ‘reasonable excuse’. According to Gaudron J, Part VII FLA gives powers to the Family Court to make parenting orders with the child’s best interests as the paramount consideration. However, it does not regulate the conduct of proceedings for the making of such orders, or the procedures to be observed. Specifically, it says nothing about whether a person who is not a party to the proceedings is subject to the Court’s power to compel production or disclosure of documents.<sup>99</sup>

6.104 The overall effect of the *GPAO* decision is thus that a federal law will not ‘otherwise provide’, and hence exclude the operation of state or territory law, unless it regulates the same issues as the state or territory law in such a way that the two laws are irreconcilable.

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96 *Reynolds v Kilpatrick* (1993) Fam LR 601.

97 *Y & F* [1990] FLC 92–141; *Mallia v Collins* [1993] FLC 92–423; *Piras v Thaisawat* (1993) 16 Fam LR 1003.

98 *Northern Territory v GPAO* (1999) 196 CLR 553, 589 (Gleeson CJ, Gummow and Hayne JJ).

99 *id.*, 607.

6.105 This strict approach to s 79 is also evidenced in the most recent decision of the High Court on the issue of whether federal law ‘otherwise provides’. In *Austral Pacific Group Ltd v Airservices Australia*,<sup>100</sup> it was argued that the provisions of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (*Comcare Act*) ‘otherwise provide[d]’ so as to preclude application of Queensland legislation<sup>101</sup> that created a right of contribution among tortfeasors. In resolving this issue, the Court applied the *GPAO* test, that is, whether the operation of the federal law so reduced the ambit of the state law as to render them irreconcilable.

6.106 A unanimous Court found that the *Comcare Act* did not otherwise provide. The purpose of s 44 of the *Comcare Act* was to establish a statutory scheme of compensation to replace common law actions for damages by employees against the Commonwealth. In this case, however, the action before the Court was for contribution among tortfeasors, both of whom may have been separately liable in tort to the employee. An action for contribution was ‘not one to recover damages’. As in *GPAO*, the court found that the federal law was silent on the specific issue covered in the state enactment, namely

the distribution between tortfeasors of the burden of the common law liability in damages to the employee. This [silence] is consistent with a legislative intention to leave such matters for the operation of state or territorial legislation ‘picked up’ by s 79.<sup>102</sup>

6.107 Once again, the thrust of this decision is that where federal legislation is silent on an issue directly raised by state or territory legislation it will not be found to ‘otherwise provide’. The rationale for this view seems to be a concern to give weight and operation to state and territory laws and not to use s 79 as an alternative to s 109 of the Constitution.

### *Application of the test*

6.108 Consistently with this approach, it has also been suggested in a number of Federal Court decisions that provisions governing extensions of time under state limitations legislation<sup>103</sup> or relaxation of limitation period for persons with a legal disability<sup>104</sup> apply in proceedings under the *Trade Practices Act 1974* (Cth). Although that Act includes its own limitation period in s 82(2), its silence on the

100 (2000) 173 ALR 619.

101 *Law Reform Act 1995* (Qld).

102 (2000) 173 ALR 619, 627 (Gleeson CJ, Gummow and Hayne JJ). See also 633 (McHugh J), 646 (Callinan J).

103 See for example, *Limitation of Actions Act 1936* (SA) s 48.

104 *id.*, s 45.

question of extensions of time does not preclude reference to state or territory law.<sup>105</sup>

6.109 In a number of other cases courts have concluded that federal laws ‘otherwise provide’ for the purposes of s 79. In *Bass v Permanent Trustee Co Ltd*<sup>106</sup> the issue before the court was whether, in Federal Court proceedings, s 79 picked up a New South Wales statute providing assistance with costs to a litigant.<sup>107</sup> The High Court unanimously held that s 43 FCAA provided the sole source of costs orders before the Federal Court and so no other state or territory provision could apply. Presumably, therefore ‘irreconcilability’ in the terms of the *GPAO* test was established in this case. A contrast may be drawn here with the cases discussed at paragraphs 6.79–6.81, such as *Solomons v District Court of NSW*,<sup>108</sup> where the Court focused on whether the state legislature intended its enactment to apply to proceedings in federal jurisdiction. In the present context the emphasis is on whether the Commonwealth intended that its provision would apply to the exclusion of any state or territory law.

6.110 Another example of irreconcilability is presented by provisions of the *Evidence Act 1995* (Cth) (*Evidence Act*). For example, s 138 of the Act provides

Evidence that was obtained:

- (a) improperly or in contravention of an Australian law or
  - (b) in consequence of an impropriety or of a contravention of an Australian law
- is not to be admitted unless the desirability of admitting evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

6.111 The dictionary of the *Evidence Act* defines an Australian law as a law of the Commonwealth or a law of a state or territory.

6.112 The Federal Court recently found s 138 to exclude the application of s 13 of the *Listening Devices Act 1984* (NSW).<sup>109</sup> Section 13 creates a general prohibition on the admission of evidence obtained by the use of a listening device in breach of the Act. In Branson J’s view, the two provisions were irreconcilable given the clear intention in the *Evidence Act* to allow the admission of illegally obtained evidence in certain circumstances. There was also a clear intent in the *Evidence Act* for its provisions to negate any conflicting state or territory laws.

105 *Chapman v Luminis Pty Ltd* (1998) 86 FCR 513; *Vink v Schering (No. 2)* [1991] ATPR 41–073. By contrast in *Pritchard v Racecase* (1997) 72 FCR 203, the Federal Court declined to apply a Northern Territory law that preserved the right of action of a deceased person after death. In the Court’s view s 82 of the *Trade Practices Act*, in conferring a right of action on a ‘person’, evinced an intention to limit actions under the Act to living persons. This case appears at odds with other cases because the Territory law was not applied, notwithstanding the silence of the federal law in relation to the preservation of rights of action.

106 (1999) 198 CLR 334.

107 *Legal Aid Commission Act 1979* (NSW) s 47.

108 [2000] NSWCA 99.

109 *Violi v Berrivale Orchards Ltd* (2000) 173 ALR 518 (Branson J).

6.113 In another series of cases in the Federal Court it has been held that, where virtually identical laws exist at both federal and state or territory levels, there is no obstacle to federal laws applying to the exclusion of state or territory laws that would otherwise have been picked up by s 79. For example, it has been found that the power to rule on a ‘no case submission’ may be deduced from the Federal Court Rules, which give the court ‘power ... to make such orders as the nature of the case requires ...’.<sup>110</sup> Although such a rule also exists under state law, the existence of federal law on the topic makes reliance on the state provisions unnecessary and, indeed, inappropriate.<sup>111</sup> The approach of the Federal Court in these cases appears sensible although much will obviously depend upon the particular federal and state laws in issue.

6.114 Another area where this ‘false conflict’ type analysis may be applied to allow the operation of federal laws concerns the awarding of interest by courts. Prior to 1984, several cases had examined whether state legislation that granted to courts the power to award interest was picked up by s 79 JA in High Court or Federal Court proceedings. The relevant state provisions were those allowing the award of interest from the time the cause of action accrues until the time of judgment — the power to award interest on a judgment debt has been long available in federal courts.<sup>112</sup> As discussed earlier in this Chapter, different conclusions were reached on this issue depending upon whether the state law referred generally to a ‘court’ (in which case the legislation was picked up)<sup>113</sup> or whether it identified a particular state or territory court (in which case no picking up occurred).<sup>114</sup> However, since 1984, with the enactment of federal legislation expressly conferring on the High Court<sup>115</sup> and the Federal Court<sup>116</sup> the power to award interest from the time a cause of action accrues, this issue has become largely moot.<sup>117</sup> There has been no need to rely on state or territory law as surrogate federal law because federal law directly makes similar provision.

110 O 35 r 1 FCR.

111 *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344, 356–7 (Sackville J); *Trade Practices Commission v George Weston Foods (No 2)* (1980) 43 FLR 55, 56–7 (Davies J); compare *Rasomen Pty Ltd v Shell Co of Australia Ltd* (1997) 75 FCR 216, 223 (Full Court).

112 See s 77N JA (High Court) s 52 FCAA (Federal Court) s 117B FLA (Family Court) s 77 FMA (Federal Magistrates Court). The High Court’s power has existed since 1921 (*High Court Procedure Act 1921* (Cth), inserting s 26A). The Federal Court’s power has existed since the Court’s inception in 1976.

113 *Neilsen v Hempstead Holdings Pty Ltd* (1984) 65 ALR 302, 311.

114 *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582, 585–587 but compare *Matthews v ACP Publishing Pty Ltd* (1998) 87 FCR 152, 160–161.

115 s 77MA(1)(a) JA.

116 s 51A FCAA.

117 D Cassidy ‘Interest revisited’ (1997) 71 *Australian Law Journal* 514.

**Question 6.13.** Should section 79 be amended to provide a clearer test of when another federal law displaces the operation of section 79? Is the High Court's current test of 'irreconcilability' a suitable test for legislative adoption?

**Question 6.14.** What is the relevance of the intention of the federal legislature, on the one hand, and of the state or territory legislatures, on the other, in determining the circumstances in which state or territory law will be picked up and applied in the exercise of federal jurisdiction?

## Interpretation of section 80

6.115 Another Until recently, s 80 JA has not been the subject of much judicial consideration. The primary reason for this has been the long-standing acceptance of the traditional view of the relationship between sections 79 and 80, which laid emphasis on s 79 to the exclusion of s 80 (see paragraphs 6.119–122). On this view, s 80 was largely ineffective and accordingly escaped judicial scrutiny.

6.116 A further reason for the lack of attention to s 80 was that until 1988, s 80 referred to 'the common law of England' rather than to 'the common law in Australia'.<sup>118</sup> This anachronism may have discouraged application of the section. In *Adams v Eta Foods Ltd* Gummow J highlighted the difficulties caused by the former wording as follows.

Section 80 rests upon the premise, which would have been accepted without question in 1903, that the common law was universal and indivisible in character. However, at least since *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, it has been plain that this premise no longer is true and that the common law as evolved in this country may diverge from that of England. The preservation of s 80 in its original form thus has become an anachronism. This is so a fortiori since the coming into effect of the *Australia Act 1986*. ... The result is that the application of s 80 now, strictly, may require evidence of foreign law, to be proved as a factual matter (*Cross on Evidence* 3d Aust ed, 1986, s 21.2), a strange situation.<sup>119</sup>

6.117 The alteration of the wording of s 80 to its current form together with the High Court's revision of the relationship between s 79 and s 80 has significant implications for the function of s 80. The current trend is to give primary place to s 80. On this view, the common law in Australia (including choice of law rules), as modified by state and territory legislation, will resolve many questions of the applicable law in matters within federal jurisdiction.

<sup>118</sup> *Law and Justice Legislation Amendment Act 1988* (Cth).

<sup>119</sup> (1988) 19 FCR 93, 95.

6.118 If s 80 is to be retained in some form, there are several textual ambiguities that may warrant clarification. Without purporting to be comprehensive, these include the following.

- ?? The expression ‘so far as the laws of the Commonwealth are not applicable’ is unclear. Is the word ‘laws’ intended to refer only to statutory laws of the Commonwealth? If so, should the section make this clear? If not, what distinction is intended between statutory and non-statutory laws of the Commonwealth, on the one hand, and ‘the common law in Australia’ on the other?
- ?? The meaning of the phrase ‘or so far as their provisions are insufficient to carry them into effect’ is obscure. When is a provision of a law insufficient to carry the law into effect? How can a Commonwealth law be applicable and yet insufficient to carry itself into effect?
- ?? It is unclear when a statute law in force in a state or territory ‘modifies’ the common law in Australia. For example, the expression would appear to include a statutory modification to the remedies available in respect of a common law cause of action (eg a statutory cap on damages). But does it include the creation of a statutory right where none existed at common law (eg a no fault compensation scheme)? Similarly, does it include a statutory choice of law rule of a state or territory?
- ?? How does one identify the ‘State or Territory in which the Court in which the jurisdiction is exercised is held’? This expression recalls the difficulties discussed above in relation to s 79 as to where federal jurisdiction is exercised (see paragraphs 6.90–6.96), but the peculiar language of s 80 complicates the matter further.
- ?? The relevance and meaning of the words ‘so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth’ is unclear. This phrase purports to indicate that the common law (as modified) does not apply in federal jurisdiction in so far as it is inconsistent with the Constitution or federal law. However, these qualifications might be considered implicit in the operation of Australian judicial system — the High Court has frequently remarked that the common law must conform to the Constitution;<sup>120</sup> federal law can modify the common law; and state or territory statutes that modify the common law must in every case give way to contrary provisions in the Constitution (covering cl 5) and federal law (s 109 of the Constitution).

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120 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566; *Theophanous v The Herald and Weekly Times Ltd* (1994) 182 CLR 104, 208.



**Question 6.15.** In section 80 of the *Judiciary Act*, what is the meaning of the phrase ‘so far as the laws of the Commonwealth are not applicable’? In particular, should the phrase be amended to refer to statutory laws alone?

**Question 6.16.** In section 80, what is the meaning of the phrase ‘so far as their provisions are insufficient to carry them into effect’? When is this condition fulfilled?

**Question 6.17.** What is the meaning of the phrase ‘the common law in Australia as modified by ... the statute law in force in the State or Territory’? Does it embrace both statutory rights of action and choice of law rules?

**Question 6.18.** Is the expression ‘so far as it is ... not inconsistent with the Constitution and the laws of the Commonwealth’ necessary?

## The relationship between sections 79 and 80

### The traditional view

6.119 The traditional interpretation of sections 79 and 80 is that a court exercising federal jurisdiction in a state or territory will apply the state or territory law in as similar fashion as possible as the state or territory court would do if no federal jurisdiction were involved. Consequently, the court exercising federal jurisdiction will apply all laws, both substantive and procedural, common law and statutory, to the proceeding. The laws so applied include state or territory choice of law rules. The rationale of this approach is that it is desirable that uniformity of outcome be achieved between all courts sitting in the same state or territory, regardless of whether the jurisdiction exercised is state, territorial or federal. This is similar to the *Erie/Klaxon* doctrine, which operates in diversity jurisdiction in the United States (see paragraphs 6.67–6.68 above).

6.120 The effect of the traditional view is that s 79 effectively covers the field as far as the application of non-federal sources of law in federal jurisdiction is concerned. There is little scope remaining for the application of s 80. Therefore, if a matter arises which is properly classified as procedural, it will be determined by the law of the forum (that is, by the law in force in the state or territory in which the court is sitting). This law may be common law or statutory in nature. If a substantive matter is involved the forum’s choice of law rules will select the system of law applicable to that particular class of matter. Depending on the factual circumstances, that system of law may be the common law or statute law of the

forum or of another jurisdiction.<sup>121</sup> Where the forum's common law choice of law rules have been replaced by a mandatory statute in the forum, then this law will be applied. In each situation, s 79 exhausts the scope of possible applicable laws in federal jurisdiction, leaving s 80 largely redundant.

6.121 A question to be considered in this Chapter is the current status of the traditional interpretation of sections 79 and 80. At least two High Court justices have recently endorsed the traditional view. In *Commonwealth v Mewett*, Dawson J (with whom Toohey J agreed) declared that 'the effect of [sections 79 and 80] is to apply to each proceeding the whole body of law in the relevant state, except to the extent to which it is inconsistent with Commonwealth laws'.<sup>122</sup>

6.122 In *Mewett* the High Court was sitting on appeal from a decision of the Federal Court in a matter heard in Sydney. Dawson J found that under s 79, the common law choice of law rules of New South Wales applied to a wrong occurring in Victoria, and New South Wales domestic law applied to a wrong occurring in New South Wales. However, there are signs among other justices in the High Court that the traditional view should be reassessed.

### The single common law view

6.123 In recent High Court jurisprudence a clear view has emerged that there exists a uniform common law in Australia, rather than separate common law systems in each of the states and territories.<sup>123</sup> This approach is relevant to the law applicable in federal jurisdiction given that s 80 JA was amended in 1988 to refer to 'the common law in Australia' rather than 'the common law of England'.

6.124 The acceptance of the idea of an Australia-wide common law has been recognised by some judges as having implications for the interpretation of sections 79 and 80, since the common law includes judge-made choice of law rules. According to Gaudron J in *Mewett*

If choice of law rules for matters involving the exercise of federal jurisdiction are recognised as part of the common law in Australia their application is directed by s 80. And as s 80 is one of 'the laws of the Commonwealth' to which s 79 is expressly subjected, there is then no need to resort to s 79 to 'pick up' state or territory choice of law rules. Rather, s 79 will operate to 'pick up' state or territory laws only to the extent that the statute law of the Commonwealth and the common law in Australia need to be supplemented to enable the issue to be determined.<sup>124</sup>

121 See *Musgrave v Commonwealth* (1937) 57 CLR 514.

122 (1997) 191 CLR 471, 506 (Dawson J), 512 (Toohey J).

123 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

124 *Commonwealth v Mewett* (1997) 191 CLR 471, 522.

6.125 This passage presents a significant alternative view of the interrelationship of sections 79 and 80. Instead of using s 79 as the starting point, s 80 is to be considered first. A court applies ‘the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory’ in which the Court sits, and only turns to s 79 where a gap appears. Some academic commentators had proposed a similar approach many years earlier. For example, O’Brien argued that recognition of a unitary system of common law should mean that most problems of applicable law in federal jurisdiction would be redundant.<sup>125</sup> However, unlike Gaudron J, O’Brien saw no need for s 80 to pick up such a law; he assumed it would apply directly in federal jurisdiction.

6.126 It is worthy of note that in the joint judgment of Gummow and Kirby JJ in *Mewett* their Honours expressed support for the Gaudron view but preferred not to apply the approach in that case since submissions had not addressed the issue.<sup>126</sup>

6.127 The rationale of Gaudron J’s view appears to be that a court exercising federal jurisdiction does not have a particular state or territory as its forum but rather the whole of Australia. While this is clearly true of federal courts, whose process, judgments and orders have effect throughout the Commonwealth,<sup>127</sup> it is not so obvious in the case of state and territory courts exercising federal jurisdiction. The purpose of sections 79 and 80 is thus not seen as ensuring consistency of result within state and territory courts whatever the source of jurisdiction being exercised, but rather as attaining uniformity between all courts exercising federal jurisdiction throughout Australia. The *Erie/Klaxon* analogy is rejected in Australia since, in the United States (unlike Australia), each state has a separate common law system.

6.128 The practical result of this approach to sections 79 and 80 is that in all matters where common law choice of law rules can identify the applicable law, s 80 will cover the field without any need to rely on s 79. The recent case of *John Pfeiffer Pty Ltd v Rogerson*<sup>128</sup> illustrates the point. There an action was commenced in the ACT Supreme Court in respect of a tortious wrong occurring in New South Wales. New South Wales statutory law imposed a limitation on damages for economic loss while ACT law did not. It appears to have been conceded by the parties that the case arose in federal jurisdiction because the possible application of the full faith and credit clause in s 118 of the Constitution had been raised at first instance. Six members of the High Court stated that, in resolving the conflict of laws between the ACT and New South Wales, s 80 should be examined first.

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125 B O’Brien ‘Choice of law in federal jurisdiction (Part 2)’ (1977) 2 *University of New South Wales Law Journal* 46, 78–79.

126 (1997) 191 CLR 471, 554.

127 See for example s 25 JA.

128 (2000) 172 ALR 625.

6.129 There were three choice of law issues addressed by the court in *Pfeiffer*. The first was the choice of law rule for torts. Because this was a matter governed by the Australian common law, s 80 was sufficient and no ‘picking up’ of state laws under s 79 was required. The common law choice of law rule applied to torts occurring within one state or territory in Australia and sued upon in another was altered by a majority of the Court from the rule in *Phillips v Eyre*<sup>129</sup> to the law of the place of the tort. Consequently, the substantive law of New South Wales was applied.

6.130 However, on the second issue — quantification of damages — New South Wales had by legislation created a different rule to that in the ACT. According to the traditional characterisation, statutory caps on damages were considered matters of procedure and so subject to the law of the forum.<sup>130</sup> If this view were applied to the facts of *Pfeiffer*, an ACT court would not have applied the New South Wales procedural statute but rather the common law rules, which allowed full recovery of damages. However, a unanimous High Court chose to alter the uniform common law choice of law rule with respect to the issue of quantification of damages. Such a matter is now considered to be substantive and so resolved by the law governing the substance of the case. In the case of torts, this is the law of the place of the tort. This reformulated common law choice of law rule, forming part of the Australian common law, is picked up by s 80 when a court exercises federal jurisdiction, as was the case here.

6.131 The third issue concerned statutes of limitation that barred the remedy rather than extinguishing the underlying cause of action. According to the existing common law choice of law rule, such statutes were also classified as procedural and therefore applied only if they were part of the law of the forum.<sup>131</sup> Again, however, the High Court altered the common law rule to render such an issue substantive and referable to the law of the cause. Once again, the question was resolved by the common law of Australia and, accordingly, s 80 applied. There was no need to resort to s 79.

6.132 The question to consider then is, under this approach, when is s 79 ever engaged? In *Mewett*, Gaudron J said that s 79 will be relevant where the common law in Australia ‘needs to be supplemented to enable the issue to be determined’. No court has specifically addressed this matter since *Mewett*, although Nygh provides a possible interpretation.<sup>132</sup> He argues that s 79 will continue to be relevant to ‘pick up’ *procedural statutes* of a state or territory. In his view, because the Australia-wide common law choice of law rules refer matters of procedure to the law of the forum and because a court exercising federal jurisdiction has

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129 (1870) 6 LR QB 1.

130 *Stevens v Head* (1993) 176 CLR 433.

131 *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

132 P Nygh ‘Choice of law in federal and cross-vested jurisdiction’ in B Opeskin and F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press Melbourne 2000, 335, 340-346.

Australia as its forum rather than any state or territory, the relevant procedural statutes of the state or territory will not be picked up by s 80. Section 79 is therefore required in this limited situation.

### **The Brennan view**

6.133 In *Mewett*, Brennan CJ took the view that s 79 and s 80 each had a distinct operation, which did not overlap.<sup>133</sup> Section 79 applied to procedural matters and s 80 to substantive matters. He drew this conclusion from the use of the words in s 79 ‘procedure, evidence and the competency of witnesses’. On the question of substantive law, his Honour’s view comports with Gaudron J’s view that the uniform common law, as amended by statute in the place of sitting, should be applied.

### **Which is the prevailing view?**

6.134 In *Northern Territory v GPAO*<sup>134</sup> the High Court had to consider whether a provision in Northern Territory legislation was ‘picked up’ in a proceeding in the Family Court. The principal issue before the High Court was whether the Family Court was exercising federal jurisdiction in a case involving custody of children in the Territory. A majority of five justices to two considered that federal jurisdiction was invoked and so the question became whether the Northern Territory legislation was picked up by sections 79 or 80. The Northern Territory law operated to prevent an officer from having to produce documents or disclose matters in court in certain circumstances.

6.135 Three of the majority justices (Gleeson CJ, Gummow and Hayne JJ) noted, consistently with the Gaudron approach in *Mewett*, that the starting point in considering the operation of sections 79 and 80 was the ‘common law in Australia’, as referred to in s 80.<sup>135</sup> Their Honours stated that ‘section 80 directs all courts exercising federal jurisdiction where they “shall go for the substantive law” and is supplemented by section 79’.<sup>136</sup>

6.136 Presumably the effect of these comments is that s 80 applies to substantive laws and s 79 to matters of procedure. It is not clear, however, whether all procedural matters fall within s 79 (see Brennan J’s view at paragraph 6.133) or only those that are the subject of statute and do not form part of the common law in Australia (see Nygh’s view at paragraph 6.132). However, in the *GPAO* case this difference did not matter because, on either view, s 79 was the relevant provision to determine whether the Northern Territory provision applied — it having been

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133 (1997) 191 CLR 471, 492.

134 (1999) 196 CLR 553.

135 id, 574.

136 id, 574, citing *South Australia v Commonwealth* (1962) 108 CLR 130, 140.

assumed by the court that the Northern Territory statute was procedural in character. The other justices forming the majority did not discuss the question of the respective roles of sections 79 and 80 but simply assumed that s 79 applied to the facts.<sup>137</sup>

6.137 The most recent decision of the High Court has done little to clarify the issue of the relationship between sections 79 and 80. In *Austral Pacific Group Ltd v Airservices Australia*<sup>138</sup> the Court had to consider an action for contribution against a Commonwealth instrumentality — Airservices — which was formerly known as the Civil Aviation Authority. The action for contribution had arisen out of a personal injury claim by an employee against a manufacturer, who then sought to join the employer, Airservices, as a third party defendant. The original accident had occurred in Queensland. Because the matter before the Court involved a Commonwealth instrumentality as a third party defendant, federal jurisdiction was attracted in the proceedings before the Supreme Court of Queensland.

6.138 No right to contribution between tortfeasors exists under either Commonwealth law or the common law. However, such a right exists under the statute law of the states and territories, including Queensland. All members of the High Court stated that the question was whether s 79 operated to pick up the Queensland contribution statute. No reference was made to s 80, apart from McHugh J, who said it was ‘not relevant in these proceedings’.<sup>139</sup> It is noteworthy that the issue of contribution among tortfeasors is substantive, not procedural, and arguably should have been resolved by reference to ‘the common law in Australia as modified by...the statute law in force in the State...in which the Court in which the jurisdiction is exercised is held’, in other words, by reference to s 80.

6.139 Other recent decisions, some involving courts other than the High Court, have shed little further light on the relationship of sections 79 and 80. In *Bialkower v Acohs Pty Ltd*<sup>140</sup> a Full Court of the Federal Court had to consider, like the *Austral Pacific* case, whether a state contribution statute was applicable to federal proceedings. In determining this issue, sole reference was made to s 79, which is more consistent with the traditional position than with the view of Gaudron J in *Mewett*. To like effect is the decision of the Federal Court in *Matthews v ACP Publishing Pty Ltd*,<sup>141</sup> where a claim for damages under the New South Wales statutory equivalent of the *Lord Cairns’ Act*, a plainly substantive matter, was admitted in federal jurisdiction pursuant to s 79.<sup>142</sup>

137 (1999) 196 CLR 553, 606 (Gaudron J); 632, 635 (Kirby J).

138 (2000) 173 ALR 619.

139 id, 633 (McHugh J).

140 (1998) 83 FCR 1.

141 (1998) 87 FCR 152.

142 *Supreme Court Act 1970* (NSW) s 68, which is based on *Lord Cairns’ Act*, grants a court the power to award damages in addition to, or in substitution for, an injunction or an order for specific performance.

6.140 In *Bass v Permanent Trustee Co Ltd*<sup>143</sup> the High Court had to determine whether a New South Wales statute, by which the Legal Aid Commission pays the costs of a legally assisted person, applied in proceedings in the Federal Court sitting in Sydney. Section 79 alone was referred to, which is consistent with all three models referred to above since the issue of costs is procedural and would not be picked up by application of common law choice of law rules under s 80.

6.141 In *Solomons v District Court of New South Wales*<sup>144</sup> the New South Wales Court of Appeal had to determine whether a New South Wales statute, which granted a defendant in criminal proceedings a right to assistance with costs, applied in the context of a prosecution in New South Wales under a federal statute. In resolving this issue, all members of the Court referred to s 79 without mentioning s 80. Importantly, two judges noted that s 79 applies to both substantive and procedural matters, which suggests an affirmation of the traditional approach.<sup>145</sup>

6.142 Recently, in *Bell Group Ltd v Westpac Banking Corporation*<sup>146</sup> Carr J in the Federal Court did not discuss the relationship between sections 79 and 80 but applied s 79 to determine whether a procedural matter in a state statute — namely, the question of leave to proceed against a company in liquidation — was picked up in proceedings before the Federal Court. In the same vein, there have also been three decisions since *Mewett* that have assumed that the limitation statute of the state in which the court is sitting applies in proceedings in federal jurisdiction.<sup>147</sup> These results are consistent with all three models referred to above since the uniform common law choice of law rules (after *John Pfeiffer Pty Ltd v Rogerson*) would refer such matters to the law governing the substance of the case, which in all three cases was the law of the forum.

**Question 6.19.** In what way should sections 79 and 80 of the *Judiciary Act* recognise the role of the common law of Australia in filling gaps and in providing choice of law rules in federal jurisdiction?

**Question 6.20.** Is there a need to retain both sections 79 and 80 of the *Judiciary Act*? If so, which of the suggested models defines the most appropriate relationship between the sections? If not, how might they best be combined?

143 (1999) 198 CLR 334. See also *Violi v Berrivale Orchards Ltd* (2000) 173 ALR 518, which is to like effect.

144 [2000] NSWCA 99.

145 id, para 11 (Mason P); para 81 (Foster AJA). *Metropolitan Health Services Board v Australian Nursing Federation* (1999) 94 FCR 132, 134–136 (Lee J).

146 [2000] FCA 439.

147 See eg *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd (in liq)* (1999) 96 FCR 217, 226–227; *Smith v Australian National Line Ltd* (1999) 159 ALR 431, 452; *Chapman v Luminis Pty Ltd* (1998) 86 FCR 513, 524.

## Choice of law in actions against the Commonwealth

6.143 Chapter 5 of this Discussion Paper addresses the issue of crown immunity in claims brought against the Commonwealth. A related issue that arises in the present context is whether provisions of the *Judiciary Act*, other than sections 79 and 80, provide separate choice of law rules in actions against the Commonwealth. Two suggested provisions are sections 56 and 64.

6.144 As has been noted by writers, on a purely literal view, it is difficult to see how either provision creates a choice of law rule.<sup>148</sup> Section 56 appears only to specify the venue in which actions may be brought against the Commonwealth. Section 64 appears to state only that the Commonwealth is to be subject to the same law as applies in actions between citizens.

### Section 56 of the *Judiciary Act*

6.145 Section 56 provides

- (1) A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth—
  - (a) in the High Court;
  - (b) if the claim arose in a State or Territory—in the Supreme Court of that State or Territory or in any other court of competent jurisdiction of that State or Territory; or
  - (c) if the claim did not arise in a State or Territory—in the Supreme Court of any State or Territory or in any court of competent jurisdiction of any State or Territory.

6.146 It has been suggested that s 56 constitutes an implied choice of law rule such that in actions against the Commonwealth in tort or contract the law to be applied is the law of the place in which the claim arose. In *Suehle v Commonwealth*,<sup>149</sup> Windeyer J took this view in relation to a claim made in New South Wales in respect of a tort committed in South Australia. The significance of his analysis lies in the fact that the claim was barred under the law of New South Wales, which would ordinarily have been applied by virtue of s 79. However, in his Honour's view the claim was able to proceed in New South Wales on the basis that the law to be applied was that of South Australia, as the state in which the claim arose.

6.147 In the earlier decision of *Musgrave v Commonwealth*, four justices of the High Court suggested that s 56 might have an effect on the law applicable in claims against the Commonwealth. Rich and Dixon JJ applied s 56 to pick up the law of

148 P Nygh *Conflict of laws in Australia* 6<sup>th</sup> ed Butterworths Sydney 1995, 473; E Sykes and M Pryles *Australian private international law* 3<sup>rd</sup> ed LBC Sydney 1991, 313; M Pryles and P Hanks *Federal conflict of laws* Butterworths Sydney 1974, 195.

149 (1967) 116 CLR 353.



the place of the tort as an alternative to their view that s 79 picked up the choice of law rules of the state in which the court sat. Evatt and McTiernan JJ relied exclusively on the view that s 56 contained such a choice of law rule.

6.148 There have been subsequent dicta supporting Windeyer J's approach.<sup>150</sup> However, in *Commonwealth v Mewett*<sup>151</sup> some members of the High Court strongly rejected this view. Gaudron J, in particular, thought that the effect of Windeyer J's view would be to reintroduce the 'vested rights' theory of choice of law into Australian law. According to this theory, all actions are governed by the law of the place in which the claim arose.<sup>152</sup> While there is much to be said for this view in the case of torts, in the case of contracts the clearly accepted rule is that the proper law of the contract determines the governing law, which is in direct conflict with this notion.<sup>153</sup> Gaudron J also stated that the effect of this view is to create a gap in respect of claims that do not arise in a state or territory, such as those that arise outside the territorial limits of Australia. In such a case the gap would presumably have to be filled by application of sections 79 and 80.

6.149 Significantly, the other judges in *Mewett* did not rely on s 56 as a source of choice of law, nor was reference made to the provision in another recent decision involving an action against the Commonwealth, *Austral Pacific Group Ltd v Air Services Australia*.<sup>154</sup>

## **Section 64 of the Judiciary Act**

6.150 Section 64 provides

In any suit in which the Commonwealth or state is a party, the rights of the parties shall as nearly as possible be the same and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

6.151 In the case of s 64, there has been less support for the argument that the section creates an implied choice of law rule. The prevailing view of the operation of s 64 stems from the High Court decision in *Maguire v Simpson*.<sup>155</sup> There, an issue arose as to whether a provision of the New South Wales limitation legislation applied in a contract action against the Commonwealth Trading Bank, as a Commonwealth entity. The Court found that it did, with Gibbs J expressing the view that s 64 did not involve the selection of any laws.

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150 *Breavington v Godleman* (1988) 169 CLR 41, 118 (Brennan J); 151–2 (Dawson J); *Commonwealth v Dinnison* (1995) 56 FCR 389, 393–396 (Gummow and Cooper JJ).

151 (1997) 191 CLR 471.

152 American Law Institute *Restatement of the law of conflict of laws* (1934).

153 The proper law of the contract is determined in accordance with the parties' intention or by reference to the system of law with which the contract has its closest and most real connection: *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 169 CLR 418.

154 (2000) 173 ALR 619. The claim in this case was for contribution between tortfeasors rather than for damages in tort, which may have placed it outside the scope of s 56 in any event.

155 (1977) 139 CLR 362.

[T]he effect of s 64...is that the *Limitation Act*, which is to be applied in the proceedings by virtue of s 79, is rendered applicable to the Commonwealth as though it were a subject.<sup>156</sup>

6.152 More recently, in *Mewett*, no justice of the High Court suggested that s 64 contained an implied choice of law rule and in *Austral Pacific* Gibbs J's view in *Maguire* was expressly approved and applied.<sup>157</sup> In *Austral Pacific* the issue was whether a Commonwealth instrumentality was liable to contribution as a tortfeasor under state legislation. In considering whether the legislation applied in federal proceedings, all justices agreed that it was s 79 that performed this function, not s 64. It was only once the relevant state law was attracted that the issue arose as to whether that law applied to the Commonwealth. Resolution of the latter question was left to s 64, which operated to place the Commonwealth in the same position as would apply 'in a suit between subject and subject', thereby giving the plaintiff the right to proceed.<sup>158</sup> Consequently, s 64 only applies once the relevant state or territory law has been picked up by s 79.

6.153 In summary, it would seem that there is now little scope for arguing that sections 56 or 64 JA provide alternative rules to sections 79 and 80 for determining the law applicable in one particular class of federal jurisdiction, namely, claims against the Commonwealth. It may also be that, since the High Court's decision in *John Pfeiffer Pty Ltd v Rogerson*, there will be less incentive to resort to provisions such as sections 56 or 64 for choice of law purposes. That is because the provisions were often invoked in the past for the purpose of applying the law of the place in which the events occurred. The motivation for this was to evade the applicable choice of law rule in torts (the rule in *Phillips v Eyre*), which placed excessive weight on the law of the forum. Now that the High Court has abandoned the rule in *Phillips v Eyre* in favour of the law of the place of the tort, at least for intra-Australian cases, the need to look to s 56 for choice of law purposes is unlikely to be great.

**Question 6.21.** Is there any need for separate rules for determining the law applicable in claims against the Commonwealth? If so, what should those rules be? If not, should sections 56 and 64 of the *Judiciary Act* be clarified to indicate that they are not intended to affect the operation of sections 79 and 80 in respect of claims in federal jurisdiction?

156 id, 377.

157 *Austral Pacific Group Ltd v Air Services Australia* (2000) 173 ALR 619.

158 id, 624 (Gleeson CJ, Gummow and Hayne JJ), 635–636 (McHugh J). Callinan J expressed no view to the contrary.

## 7. Judicial power in the territories

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### Introduction

7.1 The terms of reference ask the Commission to inquire into and report on a number of matters specifically relating to the jurisdiction of territory courts. Those matters are

- ?? the conferral of jurisdiction on territory courts under Commonwealth laws
- ?? the impact of self-government on the exercise of jurisdiction in territory courts under Commonwealth laws, and
- ?? whether it is appropriate or necessary for provisions of Part IXA JA relating to the Northern Territory to be replicated for the Australian Capital Territory (ACT).

7.2 This aspect of the reference raises complex issues as to the nature of judicial power in Commonwealth territories. The views taken on this issue by the High Court have shifted significantly since the Court first dealt with the issue in the early twentieth century. The point of debate is whether, or to what extent, the exercise of judicial power in territories is separate from the judicial power of the Commonwealth defined and regulated by Chapter III of the Constitution. The reference also involves significant questions of policy as to the extent to which the *Judiciary Act* should treat those territories that have achieved a degree of self-government in the same manner as the states.

## Commonwealth territories

7.3 The Commonwealth has a number of territories under its control.<sup>1</sup> These territories vary dramatically in location and population, and may be self-governing or non-self-governing.

### Non-self-governing territories

7.4 The Commonwealth currently has seven non-self-governing territories. These are

- ?? Ashmore and Cartier Islands
- ?? Australian Antarctic Territory
- ?? Christmas Island
- ?? Cocos (Keeling) Islands
- ?? Coral Sea Islands
- ?? Heard and McDonald Islands, and
- ?? Jervis Bay.

7.5 Non-self-governing territories lack their own legislature and, pursuant to Commonwealth law, are governed by the laws in force from time to time in a specified Australian state or territory, usually the most geographically proximate. Each territory is administered by a separate Act of Parliament, which specifies the relevant arrangement.<sup>2</sup> Four of the above territories are governed by the law in force in the ACT, two by the law of Western Australia, and one by the law of the Northern Territory.

7.6 Detailed consideration of the legal status of the non-self-governing territories is not within the terms of reference of this inquiry. However, these territories may be affected incidentally by changes to the law in force in the jurisdiction whose laws are picked up and applied in the specified territory.

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1 Previously, the Territory of Papua and the Territory of New Guinea were territories of the Commonwealth until they achieved independence in 1975. The Commonwealth also exercised powers in relation to the island of Nauru between 1920 and 1967, although it never became a territory of the Commonwealth for the purposes of s 122 of the Constitution: R Garran 'The law of the territories of the Commonwealth' (1935) 9 (Supplement) *Australian Law Journal* 28, 30; *Nauru Island Agreement Act 1919* (Cth); *Nauru Island Agreement Act 1932* (Cth); *Nauru Act 1965* (Cth); *Nauru Independence Act 1967* (Cth).

2 *Ashmore and Cartier Islands Acceptance Act 1933* (Cth), *Australian Antarctic Territory Act 1954* (Cth), *Christmas Island Act 1958* (Cth), *Cocos (Keeling) Islands Act 1955* (Cth), *Coral Sea Islands Act 1969* (Cth), *Heard and McDonald Islands Act 1953* (Cth), *Jervis Bay Territory Acceptance Act 1915* (Cth).

## Self-governing territories

7.7 Self-governing territories have local legislatures with wide but not unlimited power to make laws for that territory. There are three self-governing territories in Australia — the ACT, Norfolk Island Territory and the Northern Territory, which are described further below.

### *Australian Capital Territory*

7.8 At the time of federation, the land which is now the ACT formed part of New South Wales. Pursuant to s 111 of the Constitution, the land was surrendered by the State and accepted by the Commonwealth with effect from 1 January 1911<sup>3</sup> in order to provide a territory in which the seat of government could be located.<sup>4</sup> In 1901 the Australian Constitution had left open the location of the seat of government, specifying in s 125 only that it had to be located in New South Wales and ‘distant not less than 100 miles from Sydney’. Unlike the Northern Territory, the ACT probably cannot progress to statehood because it contains the seat of government of the Commonwealth.<sup>5</sup> That is because s 52(i) of the Constitution makes the power of the Commonwealth to make laws for the seat of government exclusive of the states.<sup>6</sup>

7.9 Between 1911 and 1989 the ACT was governed directly by the Commonwealth under the *Seat of Government (Administration) Act 1910* (Cth). The ACT was granted self-government in 1989.<sup>7</sup> The *Australian Capital Territory (Self-Government) Act 1988* (Cth) establishes the ACT as a separate body politic under the Crown (s 7). The Legislative Assembly has power to ‘make laws for the peace order and good government of the Territory’ (s 22), subject only to certain express exclusions. These exclusions include laws with respect to the acquisition of property other than on just terms, corporations, classification for the purposes of censorship (s 23(1)) and laws allowing euthanasia (s 23(1A)–(1B)).<sup>8</sup> The Governor-General also has power to disallow laws within six months of their enactment (s 35).

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3 *Seat of Government Surrender Act 1909* (NSW); *Seat of Government Acceptance Act 1909* (Cth). Pursuant to s 5 of the latter Act, the ACT was proclaimed as a Commonwealth territory from 1 January 1911.

4 The determination of the location of the Territory is described in W Harrison Moore *The Constitution of the Commonwealth of Australia* 2nd ed Charles F Maxwell Melbourne 1910, 590–592; J Ewens ‘Where is the seat of government?’ (1951) 25 *Australian Law Journal* 532.

5 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 266, 273; *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 165 ALR 171, 174; *Spratt v Hermes* (1965) 114 CLR 226, 232.

6 *Svikart v Stewart* (1994) 181 CLR 548, 560.

7 The political process leading to the grant of self-government is described in Grundy et al *Reluctant Democrats: The transition to self-government in the Australian Capital Territory* Federal Capital Press of Australia Canberra 1996.

8 See G Williams & M Darke ‘Euthanasia laws and the Australian Constitution’ (1997) 20 *University of New South Wales Law Journal* 647.

7.10 Executive power in the ACT is exercised by the ACT Executive, which is made up of the Chief Minister and other Ministers of the government (sections 36-39, 43). Unlike the states and the Northern Territory, the executive government does not involve a representative of the Crown.<sup>9</sup>

7.11 The Supreme Court of the ACT was created in 1933. Until 1992 the Court was established and empowered by a Commonwealth statute — the *Australian Capital Territory Supreme Court Act 1933* (Cth).<sup>10</sup> Responsibility for the Court was transferred to the ACT in 1992 when that Act — renamed the *Supreme Court Act 1933* (ACT) — was converted into a territory enactment and hence subject to repeal or amendment by the territory legislature.<sup>11</sup> At the same time, the continued existence and jurisdiction of the Supreme Court of the ACT was protected by the inclusion of provisions in the *Australian Capital Territory (Self-Government) Act 1988* (Cth) relating to the jurisdiction of the Supreme Court and the removal of judicial officers (s 48A–48D). In particular, s 48A was inserted. That section provides

48A(1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

7.12 Because this provision is located in a Commonwealth Act, the ACT Legislative Assembly cannot amend it. This has the effect that the jurisdiction of the ACT Supreme Court is entrenched so far as the ACT Legislative Assembly is concerned.<sup>12</sup>

7.13 The ACT Supreme Court presently comprises four resident judges, a master and nine additional judges who are judges of the Federal Court.<sup>13</sup> The additional judges sit only when the workload of the ACT Supreme Court requires it and in practice they spend most of their time as Federal Court judges. There is also power to appoint acting judges and since 1993 a number of acting judges have been appointed.<sup>14</sup>

9 See G Lindell 'The arrangements for self-government for the Australian Capital Territory: a partial road to republicanism in the seat of government?' (1992) 3 *Public Law Review* 5, 13–15.

10 The history of judicial power in the ACT is described in J Miles 'Justice at the seat of government' (1992) 66 *Australian Law Journal* 555; D Mossop 'The judicial power of the Australian Capital Territory' (1999) 27 *Federal Law Review* 19.

11 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 34; *ACT Supreme Court (Transfer) Act 1992* (Cth) s 13.

12 See also *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 165 ALR 171, 190–191; cf J Miles 'Justice at the seat of government' (1992) 66 *Australian Law Journal* 555, 564.

13 *Supreme Court Act 1933* (ACT) s 4, 38, 4(3), respectively.

14 Most notably Carruthers AJ, the validity of whose appointment was challenged unsuccessfully in *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 165 ALR 171.

7.14 The ACT Supreme Court also has jurisdiction in relation to the Jervis Bay Territory, the Australian Antarctic Territory and the Territory of Heard and McDonald Islands, being three other territories in which ACT law is applied.<sup>15</sup>

7.15 Appeals from the ACT Supreme Court are to a Full Court of the Federal Court.<sup>16</sup> Until 1999 it was a requirement that at least one resident judge of the ACT Supreme Court sit on such appeals.<sup>17</sup> At present, two of the three resident judges of the ACT Supreme Court also hold commissions as judges of the Federal Court. However, since the transfer of responsibility for the Court to the ACT, the Commonwealth has adopted a policy of not appointing ACT Supreme Court judges to the Federal Court.<sup>18</sup> As a consequence of the decreasing availability of ACT Supreme Court judges who also hold Federal Court commissions, the *Federal Court of Australia Act* was amended in 1999 so as to no longer *require* a resident judge of the ACT Supreme Court to sit on appeals from the ACT, but rather for the Chief Justice of the Federal Court to adopt that course unless it is impractical to do so.<sup>19</sup>

### ***Norfolk Island***

7.16 Norfolk Island has a long constitutional history dating back to 1788 when it was first occupied as a convict settlement.<sup>20</sup> The island became a territory of the Commonwealth in 1914 as a result of being placed under the authority of the Commonwealth by an Order in Council and accepted by the Commonwealth under the *Norfolk Island Act 1913* (Cth).<sup>21</sup>

7.17 Norfolk Island has been granted a significant degree of self-government, although not to the same extent as the ACT or the Northern Territory. Under the *Norfolk Island Act 1979* (Cth), the executive power of the Territory is vested in an Administrator appointed by the Governor-General (s 5). The Commonwealth Minister may give instructions to the Administrator in relation to some matters,

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15 A fourth, the Coral Sea Islands Territory, is governed by ACT law, but jurisdiction is conferred on the courts of Norfolk Island. See *Coral Sea Islands Act 1969* (Cth) s 18.

16 s 24 FCAA.

17 s 25(3) FCAA.

18 As a consequence, Crispin J, who was appointed to the ACT Supreme Court in 1997, does not hold a commission as a judge of the Federal Court. A new ACT Supreme Court judge is to be sworn in to replace the recently retired Gallop J. The new judge is not expected to have a dual commission with the Federal Court.

19 *Law and Justice Legislation Amendment Act 1999* (Cth) s 3 Sch 7, which amended s 25(3) FCAA.

20 The history is described in H Renfree *The federal judicial system of Australia* Legal Books Pty Ltd Sydney 1984, 753–762; Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs *Islands in the sun: the legal regimes of Australia's external territories and the Jervis Bay Territory* AGPS Canberra 1991 (*Islands in the Sun*), 132–135; *Cook v Administration of Norfolk Island* (1992) 111 ALR 453, 492–498. See also F Hutley 'Sources of the law on Norfolk Island' (1950) 24 *Australian Law Journal* 108; J Ewens 'Norfolk Island as part of the Commonwealth' (1980) 54 *Australian Law Journal* 68.

21 *Norfolk Island Act 1979* (Cth) Preamble; in H Renfree *The Federal Judicial System of Australia* Legal Books Pty Ltd Sydney 1984, 756.

although in relation to others the Administrator must act on the advice of the Executive Council of Norfolk Island (s 7). The members of the Executive Council are appointed by the Administrator on the advice of the Legislative Assembly (s 13). Legislative power in the Territory is vested in the Legislative Assembly, which has broad legislative powers subject to the assent of the Administrator or the Governor-General (s 19, 21–22). Enactments of the Assembly may be subject to disallowance by the Governor-General (s 23) and the Governor-General has a limited power to make ordinances in relation to the Territory (s 26–27).

7.18 Judicial power in the Territory is exercised by the Supreme Court of Norfolk Island as well as any other courts and tribunals established by enactment of the Legislative Assembly (s 60). While the Supreme Court is established by the *Norfolk Island Act 1979* (Cth), its jurisdiction is determined by enactment of the Legislative Assembly (s 59). The judges of that Court must also be judges of a court created by the Commonwealth Parliament (s 51(1)–(1A)). Currently two Federal Court judges hold commissions as judges of the Supreme Court of Norfolk Island. Appeals from the Supreme Court are to the Federal Court of Australia.<sup>22</sup>

### *Northern Territory*

7.19 At the time of federation what is now the Northern Territory formed part of South Australia. It was surrendered by South Australia and accepted by the Commonwealth with effect from 1 January 1911 — the same day on which the ACT became a Commonwealth territory (see paragraph 7.8).<sup>23</sup> Between 1911 and 1978 the Territory was governed by the Commonwealth pursuant to the *Northern Territory (Administration) Act 1910* (Cth), although there was increasing local involvement in government over time.<sup>24</sup>

7.20 The Northern Territory was granted self-government in 1978.<sup>25</sup> It is possible that the Northern Territory could move beyond self-government and be admitted as a new state pursuant to s 121 of the Constitution.<sup>26</sup> There have been considerable efforts on the part of the government of the Territory to promote the move to statehood, including the drafting of a proposed Constitution and the holding of an unsuccessful referendum on the issue.<sup>27</sup>

22 s 24 FCAA.

23 *Northern Territory Surrender Act 1907* (SA); *Northern Territory Acceptance Act 1910* (Cth).

24 See H E Renfree *The Federal Judicial System of Australia* Legal Books Pty Ltd Sydney 1984, 749; R Lumb 'The Northern Territory and statehood' (1978) 52 *Australian Law Journal* 554, 555–556.

25 *Northern Territory (Self-Government) Act 1978* (Cth).

26 The potential operation of s 121 in relation to the Northern Territory is discussed in P Loveday & P McNab *Australia's seventh state* Law Society of the Northern Territory and the North Australia Research Unit of the Australian National University 1988, especially Appendices 2–4.

27 See R Gray 'The Statehood Convention' (1998) 9 *Public Law Review* 127; A Heatley and P McNab 'The Northern Territory Statehood Convention 1998' (1998) 9 *Public Law Review* 155; A Heatley and P McNab 'The Northern Territory Statehood Referendum 1998' (1999) 10 *Public Law Review* 3.



7.21 Under the *Northern Territory (Self-Government) Act 1978* (Cth), the Territory is established as a body politic under the Crown (s 5). The Legislative Assembly has general legislative power, subject to the requirement that either the Administrator or the Governor-General assent to those laws (s 6–8) and to the power of the Governor-General to disallow laws (s 9). Executive power is vested in the Administrator, the Executive Council and the Ministers of the Territory (sections 31–34).

7.22 At the time of self-government, the responsibility for the Northern Territory Supreme Court was passed from the Commonwealth to the Territory. This involved the repeal of the *Northern Territory Supreme Court Act 1961* (Cth) and the enactment by the Territory legislature of the *Supreme Court Act 1979* (NT). Under the latter Act, the Northern Territory Supreme Court presently comprises seven judges, two additional judges and a master. There is also power to appoint acting judges (s 32(2)).

7.23 Until 1986, appeals from the Northern Territory Supreme Court were to the Federal Court and then to the High Court. Since that time, appeals from a single judge of the Supreme Court have been to the Court of Appeal of the Northern Territory (s 51) and then, pursuant to s 35AA JA, to the High Court (see paragraphs 7.101–7.111).<sup>28</sup>

## The nature of judicial power in Commonwealth territories

7.24 The constitutional basis for the government of all territories is s 122 of the Constitution. That is so in the case of the ACT, even though it contains the seat of government.<sup>29</sup> Section 122 provides

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

7.25 This power has been accepted as a plenary power for the government of the territories, subject only to a requirement that there be a sufficient nexus between the law and the territory.<sup>30</sup> In *Spratt v Hermes* Barwick CJ said that s 122

<sup>28</sup> The courts of the Northern Territory also exercise jurisdiction in relation to the Territory of Ashmore and Cartier Islands: *Ashmore and Cartier Islands Acceptance Act 1933* (Cth) s 12.

<sup>29</sup> *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 165 ALR 171.

<sup>30</sup> *Buchanan v Commonwealth* (1913) 16 CLR 315, 327; *R v Bernasconi* (1915) 19 CLR 629, 637; *Porter v R; Ex parte Yee* (1926) 37 CLR 432, 440, 448; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 62, 79; *Lamshed v Lake* (1958) 99 CLR 132, 141, 153; *Spratt v Hermes* (1965) 114 CLR 226, 242; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591, 625; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 514, 526; *Berwick Ltd v Gray* (1976) 133 CLR 603, 607; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 266, 269.

is not only plenary but is unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory ... This is as large and universal a power of legislation as can be granted.<sup>31</sup>

7.26 In *Berwick v Gray* Mason J, with whom the other judges agreed, said that

[t]he power conferred by s 122 is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development. It is sufficiently wide to enable the passing of laws providing for the direct administration of a Territory by the Australian Government without separate territorial administrative institutions or a separate fiscus; yet on the other hand it is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus.<sup>32</sup>

7.27 There are two general problems in the interpretation and application of s 122. The first is whether the section must be read down by reason of the limitations found elsewhere in the Constitution. For example, does the Commonwealth have plenary power to acquire property in the territories, or is it limited by the words of s 51(xxxi), namely, that the acquisition be on 'just terms'?<sup>33</sup> Even if s 122 is not construed as being qualified by limitations found elsewhere in the Constitution, there is a second problem of how to deal with Commonwealth laws that purport to apply throughout Australia but which could only be valid if enacted for the territories. The choice for the courts in such cases is to read down the laws so that they apply only in the territories or to strike them down altogether.<sup>34</sup>

7.28 In determining the appropriate scope and operation of the *Judiciary Act*, it is also important to understand the relationship between the power to make laws for the government of a territory in s 122, and the 'judicial power of the Commonwealth' referred to in s 71 of the Constitution and described in the remaining provisions of Chapter III of the Constitution.<sup>35</sup> The question of importance is whether the exercise of judicial power in a Commonwealth territory is part of the judicial power of the Commonwealth or not. If the power in s 122, including the power to make laws about the exercise of judicial power in territories, is not qualified by the requirements relating to the judicial power of the

31 (1965) 114 CLR 226, 242.

32 (1976) 133 CLR 603, 607.

33 Contrast *Teori Tau v Commonwealth* (1969) 119 CLR 564 with *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

34 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

35 The relationship between s 122 and the rest of the Constitution is discussed in P Nygh 'Federal and territorial aspects of federal legislative power over the territories: a comparative study' (1963) 37 *Australian Law Journal* 72; L Zines 'Laws for the government of any territory' (1966) 2 *Federal Law Review* 72; C Comans 'Federal and territorial courts' (1971) 4 *Federal Law Review* 218; Z Cowen & L Zines *Federal Jurisdiction in Australia* 2nd ed Oxford University Press Melbourne 1978, 141–173; C Horan 'Section 122 of the Constitution: A "disparate and non-federal power"?' (1997) 25 *Federal Law Review* 97; A Hopper 'Territories and Commonwealth places: the constitutional position' (1999) 73 *Australian Law Journal* 181.

Commonwealth identified in Chapter III of the Constitution then the Parliament is unconstrained in the arrangements that it makes for the exercise of judicial power in the territories. If, on the other hand, territory judicial power is within the scope of Chapter III, then that power must be given in accordance with Chapter III, or at least in accordance with those provisions of Chapter III that apply to it. The various provisions of Chapter III require that

- ?? judicial power be exercised only by the types of courts specified in s 71 and not by other bodies
- ?? judges hold tenure until age 70 (or such lesser age as is prescribed by Parliament) unless removed by the Governor-General on an address of both Houses of Parliament (s 72)
- ?? there be a constitutional right of appeal from certain courts to the High Court (s 73(ii)), and
- ?? trials on indictment be by jury (s 80).

7.29 The most influential early decision on the relationship between Chapter III of the Constitution and the exercise of judicial power in territories was *R v Bernasconi*.<sup>36</sup> The question in that case was whether or not s 80 of the Constitution (which requires that trials on indictment be by jury) applied to a trial in the Territory of Papua. The High Court unanimously held that it did not but went further and suggested that Chapter III of the Constitution was wholly inapplicable to the exercise of judicial power in the territories. Griffith CJ said

Chapter III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to the territories.<sup>37</sup>

7.30 This view involved a strict separation between the exercise of judicial power in respect of territories and the judicial power of the Commonwealth dealt with in Chapter III. In *In re Judiciary and Navigation Acts*,<sup>38</sup> the High Court held that Chapter III was an exhaustive statement of the judicial power that could be exercised by Chapter III courts. Combined with the *Bernasconi* approach, which suggested that Chapter III had no application to the territories, this would mean that Chapter III courts, including the High Court, could not exercise jurisdiction in territory matters. However, despite *In re Judiciary and Navigation Acts*, the High Court held in *Porter v R; Ex parte Yee*<sup>39</sup> that jurisdiction to hear appeals from territory courts could be given to a Chapter III court — in that case, the High Court.

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<sup>36</sup> (1915) 19 CLR 629.

<sup>37</sup> id, 635.

<sup>38</sup> (1921) 29 CLR 257.

<sup>39</sup> (1926) 37 CLR 432.

7.31 The approach of the High Court to these issues in the 1920s was not uniform<sup>40</sup> and involved an apparent inconsistency with *In re Judiciary and Navigation Acts*. Nevertheless, in later years, the pragmatic interpretation adopted in *Porter* was accepted and affirmed in a series of cases,<sup>41</sup> including by the High Court and the Privy Council in the *Boilermakers' Case*.<sup>42</sup> The accepted position was thus that the exercise of judicial power in territories was outside Chapter III, although jurisdiction in appeals from territory courts could be vested in Chapter III courts.

7.32 The approach in these cases, which emphasised the separation of the territories power from the rest of the Constitution, was also adopted in cases dealing with subjects other than judicial power. In *Teori Tau v Commonwealth*<sup>43</sup> it was held that the requirement in s 51(xxxi) of the Constitution that any laws for the acquisition of property by the Commonwealth provide 'just terms' did not qualify the power of the Commonwealth to acquire property in territories pursuant to s 122 of the Constitution. This was consistent with the approach that characterised s 122 as separate from and not qualified by the 'federal' provisions of the Constitution, namely, those which distributed powers between the Commonwealth and the states.

7.33 Following these decisions, the High Court held in *Spratt v Hermes*<sup>44</sup> that s 72 of the Constitution (which provides for the tenure of federal judges) did not apply to the appointment of magistrates in the ACT. This was because the Magistrates Court was not a federal court within the meaning of that section. As a result, there was no need to give territory magistrates and judges life tenure and they could be removed by means other than an address of both Houses of the Commonwealth Parliament.

7.34 In *Capital TV and Appliances Pty Ltd v Falconer*<sup>45</sup> the High Court held that the Supreme Court of the ACT was neither a federal court nor a court exercising federal jurisdiction for the purposes of Chapter III. As a result there was no constitutional right of appeal from that Court to the High Court pursuant to s 73(ii) of the Constitution. Any such right of appeal needed to be granted by statute.

40 Compare *Mainka v Custodian of Expropriated Property* (1924) 34 CLR 297, which held that the Central Court of New Guinea was a federal court for the purposes of s 73 of the Constitution, with *Edie Creek Pty Ltd v Syme* (1929) 43 CLR 53, which held the opposite.

41 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582, 584-585; *Frost v Stevenson* (1937) 58 CLR 528, 556, 566; *Waters v Commonwealth* (1951) 82 CLR 188; *Lamshed v Lake* (1958) 99 CLR 132, 142, 151.

42 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 290, 292; *Attorney-General of the Commonwealth of Australia v R* (1957) 95 CLR 529, 545.

43 (1969) 119 CLR 564.

44 (1965) 114 CLR 226.

45 (1971) 125 CLR 591.

7.35 The cases of *Spratt* and *Capital TV and Appliances* confirmed, although with some reluctance, the earlier approach that characterised the exercise of judicial power in territories as separate from the judicial power of the Commonwealth, as described in Chapter III.

7.36 However, since 1997 that approach has been undermined by a series of High Court decisions, which reject the separation of territory judicial power from Chapter III.

7.37 *Kruger v Commonwealth*<sup>46</sup> was a challenge by Aborigines from the Northern Territory to the lawfulness of their removal as children from their parents and their detention in Aboriginal institutions or reserves. One issue that arose was whether the children could have been detained without the exercise of judicial power in accordance with Chapter III of the Constitution. This raised two questions — (a) whether or not the removal and detention was something that could only be achieved by the exercise of judicial power and (b) whether Chapter III of the Constitution applied in the Northern Territory so as to require that such judicial power be exercised by a Chapter III court. Three of the six justices<sup>47</sup> indicated that they were attracted by the proposition that the exercise of judicial power in territories was governed by Chapter III and, in particular, by the separation of powers implied from the structure of the Constitution.<sup>48</sup> However, because those justices held that the removal and detention of the children in the circumstances of the case did not involve the exercise of judicial power<sup>49</sup> it was unnecessary for this issue to be decided. The other three justices rejected the application of Chapter III to the exercise of judicial power in the territories.<sup>50</sup>

7.38 Soon after this decision, and despite the decision of *Teori Tau*<sup>51</sup> the Court held in *Newcrest Mining (WA) Ltd v Commonwealth*<sup>52</sup> that a Commonwealth law operating in the Northern Territory, which incorporated certain mining leases into Kakadu National Park without compensation on just terms, was invalid. In doing so, three of the seven justices held that *Teori Tau v Commonwealth* was wrong and should not be followed.<sup>53</sup> The majority relied upon the fact that the law in question was supported not only by s 122 of the Constitution but by the external affairs power (s 51(xxix)) and hence incorporated some ‘federal’ power, which could pick up the operation of s 51(xxxi). However, the doubts expressed about *Teori Tau* and the approach adopted was consistent with a trend towards seeing s 122 as qualified by other provisions of the Constitution, rather than as a separate and distinct plenary power, which operated free from those qualifications.

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46 (1996) 190 CLR 1.

47 id, 80–84 (Toohey J), 107–109 (Gaudron J), 174–176 (Gummow J).

48 The application of the separation of powers doctrine to state courts is discussed in Ch 2.

49 (1996) 190 CLR 1, 84–85 (Toohey J), 109–111 (Gaudron J), 161–162 (Gummow J).

50 id, 43–44 (Brennan CJ), 62 (Dawson J), 141–142 (McHugh J).

51 (1969) 119 CLR 564.

52 (1997) 190 CLR 513.

53 id, 565, 613–614, 651–652.

7.39 *Northern Territory v GPAO*<sup>54</sup> raised the issue of whether the Family Court, when hearing a matter in the Northern Territory involving an ex-nuptial child, was exercising ‘federal jurisdiction’ within the terms of s 79 JA. A majority of the Court decided that, when exercising judicial power in a matter arising under a law made by the Commonwealth Parliament pursuant to s 122 of the Constitution, the Family Court was exercising ‘federal jurisdiction’ within the meaning of s 79 JA. That conclusion was arrived at because the majority of the Court recognised that matters arising under laws made pursuant to s 122 of the Constitution were ‘matters arising under a law made by the Parliament’ within the terms of s 76(ii) of the Constitution.<sup>55</sup>

7.40 *Spinks v Prentice*<sup>56</sup> involved a challenge to the validity of the provisions of the *Corporations Act 1989* (Cth) — a law made for the ACT pursuant to s 122 of the Constitution — which invested jurisdiction in the Federal Court. The High Court followed *Northern Territory v GPAO* and held that matters arising under a Commonwealth law made pursuant to s 122 could be invested in a federal court pursuant to s 77(i) of the Constitution because they fell within s 76(ii) of the Constitution.

7.41 Finally, in *R v Governor, Goulburn Correctional Centre; Ex parte Eastman*<sup>57</sup> there was a direct challenge to the decisions of the High Court in *Spratt* and *Capital TV and Appliances*. In that case, Eastman sought a writ of habeas corpus to have himself released from prison following his trial and conviction for murder by an acting judge of the ACT Supreme Court. It was argued that only persons holding the tenure required by s 72 of the Constitution could exercise judicial power in the ACT. This argument was rejected by a majority of six to one, although the different reasoning adopted by the majority justices is significant. Three of the justices, Gleeson CJ, McHugh and Callinan JJ, held that *Spratt* and *Capital TV and Appliances* should not be overruled at least in so far as the narrow question of the application of s 72 to territory courts was concerned.<sup>58</sup> Gaudron J also considered that *Spratt* and *Capital TV and Appliances* should not be overruled as to the application of s 72 but on the basis that judicial power in the territories formed part of the judicial power of the Commonwealth within the meaning of s 71 of the Constitution and that territory courts were courts invested with federal jurisdiction within the terms of that section.<sup>59</sup> Gummow and Hayne JJ, who wrote a joint judgment, adopted a similar view. Their Honours considered the ‘preferable construction’ of the Constitution to be that a territory court is not a federal court but one of the ‘other courts’ that may be invested with federal jurisdiction, the

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54 (1999) 196 CLR 553.

55 id, 589–592, 604–605, 650–651.

56 (1999) 198 CLR 511.

57 (1999) 165 ALR 171.

58 id, 174–175.

59 id, 179–182.

power to invest the jurisdiction coming from s 122.<sup>60</sup> Their Honours did not need to decide this point finally because they considered that, at least by 1995, the ACT Supreme Court was, in relevant respects, not ‘a court created by the Parliament’ within the meaning of s 72 of the Constitution. As a result, even if it was otherwise applicable, s 72 would not apply to an acting judge of the Court.<sup>61</sup> Kirby J dissented. His Honour would have overruled both *Spratt* and *Capital TV and Appliances* and held that territory courts were federal courts within the meaning of sections 71 and 72 of the Constitution.<sup>62</sup>

7.42 Thus it is clear from the decisions of the High Court in *Kruger*, *GPAO*, *Spinks* and *Eastman* that the trend of decisions in the Court as presently constituted is towards characterising the exercise of judicial power in Commonwealth territories as being subject to at least some of the provisions of Chapter III of the Constitution. It would be consistent with the approach identified in these cases to hold that either the whole or part of the exercise of judicial power in the territories forms part of the judicial power of the Commonwealth referred to in s 71 of the Constitution. However, until the question arises squarely for decision, the position will not be clear and the courts may continue to apply practical solutions to the particular problems at hand. The approach that ought to be taken in the *Judiciary Act* to the exercise of judicial power in the territories will thus be subject to some uncertainty.

7.43 If it were held that territory judicial power formed part of the judicial power of the Commonwealth and that territory courts were courts invested with federal jurisdiction pursuant to s 122 of the Constitution, other things would follow. For example, it would probably be necessary to ensure that a Commonwealth statute such as the *Judiciary Act* invested that jurisdiction in territory courts, rather than relying on a territory statute to give jurisdiction to the territory courts. That is because s 71 of the Constitution requires the Commonwealth Parliament to invest federal jurisdiction and the investiture of jurisdiction in a territory court by a territory legislature pursuant to self-government legislation may not be sufficient to satisfy this requirement.

7.44 For example, a question would arise in relation to the Northern Territory Supreme Court. That Court is the only territory Supreme Court that is not at present given its jurisdiction directly by a Commonwealth law. Following self-government, the Commonwealth repealed the *Northern Territory Supreme Court Act 1961* (Cth) and the Territory enacted the *Supreme Court Act 1979* (NT). Since that time — apart from the provisions of Part IXA JA, which are discussed below

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60 id, 187–188.

61 id, 189–192.

62 id, 214–216.

— no Commonwealth statute directly invests the Court with jurisdiction.<sup>63</sup> At best, the *Northern Territory (Self-Government) Act 1978* (Cth) gives power to the Territory to make laws creating or continuing the Court and giving it jurisdiction.<sup>64</sup> There is no direct investing of the Court's general jurisdiction by the Commonwealth Parliament for the purposes of s 71 of the Constitution. It may be necessary for a Commonwealth law to invest this jurisdiction in the Supreme Court to enable it to exercise federal judicial power constitutionally. If this were the case, the practical consequences would be dramatic. It is likely that all past orders of the Northern Territory Supreme Court would be invalid, including orders in criminal jurisdiction. Consequently, all prisoners in the Northern Territory would have to be released from custody and they could only be re-imprisoned if re-charged and found guilty upon a new trial. The same difficulties would arise in relation to inferior courts of a number of territories, the jurisdiction of which is not directly supported by Commonwealth legislation.

7.45 If the High Court were to hold that territory judicial power formed part of the judicial power of the Commonwealth, then it might be subject to the separation of powers doctrine confirmed in the *Boilermakers' case*.<sup>65</sup> This would also have implications for the scope of legislation investing judicial powers in that it would need to be clear that such powers could be invested only in bodies that were 'courts' for the purposes of s 71 of the Constitution.

7.46 Finally, no appellate court has yet determined whether common law claims arising in territories are within the scope of s 76(ii) of the Constitution as matters 'arising under any laws made by the Parliament'.<sup>66</sup> If so, the judicial determination of common law claims in territories may form part of the judicial power of the Commonwealth for the purposes of s 71 of the Constitution. The basis of this claim is discussed further in paragraphs 7.95–7.100. If such common law matters are not within s 76(ii) then a different approach may need to be taken in the *Judiciary Act* to claims arising in the territories under the common law and claims arising under a law made by the Parliament.

7.47 Until the High Court reaches a settled position on the relationship between territory judicial power and the judicial power of the Commonwealth, uncertainties will remain. In particular, it is unclear whether or not Commonwealth laws that establish and regulate territory judicial power need to comport with some of the provisions of Chapter III of the Constitution.

63 Leaving aside the cross-vesting legislation, which is expressly excluded from the Commission's terms of reference.

64 See the general grant of legislative power in *Northern Territory (Self-Government) Act 1978* (Cth) s 6.

65 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

66 See *O'Neill v Mann* [2000] FCA 1180 (Finn J).



**Question 7.1.** Should amendments to the *Judiciary Act* that raise constitutional issues concerning the nature of judicial power in the territories be postponed until the High Court clarifies the constitutional position of territory courts? If so, what aspects remain suitable for current reform?

**Question 7.2.** Should the *Judiciary Act* invest the courts of the Northern Territory and the ACT with jurisdiction in matters within the scope of sections 75 and 76 of the Constitution?

**Question 7.3.** Should any such investiture distinguish between common law matters and matters arising under Commonwealth or territory statutes?

## The question of parity between territories and states

7.48 The manner in which the *Judiciary Act* deals with territories will be influenced by whether or not those territories, or at least some of them, should be treated in a similar manner to states.

7.49 At the time of federation in 1901 the Commonwealth had no territories. The Constitution brought together the six colonies of Australia into ‘one indissoluble Federal Commonwealth’.<sup>67</sup> The first territory to be accepted by the Commonwealth was that of Papua<sup>68</sup> — an external territory with a large, settled population that was culturally very different to that of Australia. The next two territories to come under Commonwealth control, the ACT and the Northern Territory, were carved out of the area of the original states. Other territories have since been acquired or accepted by the Commonwealth by means of surrender from a state, acceptance from Great Britain, or the assertion of Australian sovereignty over them.

7.50 The populations of the territories have varied from zero, such as the Territory of Ashmore and Cartier Islands, to several million, as with the Territories of Papua and New Guinea prior to independence. At present, the most populous territories are the ACT and the Northern Territory, which have populations of approximately 308 000 and 190 000 respectively.

7.51 The extent to which territories have been granted self-government has depended upon their populations and culture. The less populous territories have been and are likely to remain subject to a significant degree of direct Commonwealth control. The exception to this is Norfolk Island, which for

<sup>67</sup> *Commonwealth of Australia Constitution Act 1900* (Imp), Preamble.

<sup>68</sup> *Papua Act 1905* (Cth). See R Garran ‘The law of the territories of the Commonwealth’ (1935) 9 (Supplement) *Australian Law Journal* 28, 29.

historical and geographical reasons has been allowed a significant measure of self-government despite the small size of its resident population (1 772 persons in the 1996 Census).

7.52 The more populous territories of the Northern Territory and the ACT have, during the course of their histories, gradually been given more autonomy, leading to the granting of self-government in 1978 and 1989 respectively. Prior to that they had been granted more limited forms of local input into their governments<sup>69</sup> and steps had been taken to put their residents on a more equal footing with residents of the states by granting them both political representation in the Commonwealth Parliament<sup>70</sup> and a role in referendums to amend the Constitution.<sup>71</sup>

7.53 In most respects, the schemes for granting self-government to the ACT and the Northern Territory put those polities in a similar position to the states. Both polities have plenary legislative powers to make laws for the peace, order and good government of their jurisdictions, subject only to limited specific exclusions described in paragraphs 7.9 and 7.21. Some of these limitations on legislative power are intended to put the territories in the same position as the states. For example, neither the ACT nor the Northern Territory has legislative power to impose duties of excise, just as s 90 of the Constitution removes that power from the states.<sup>72</sup> The rationale for such a limitation is that, because the ACT and the Northern Territory were carved out of the area of the original states, they should be part of the free trade area created by the Constitution.<sup>73</sup> Other sections of the Acts granting self-government to these territories seek to replicate other constitutional limitations on state legislative power, such as the capacity of a state to raise or maintain a naval or military force, or to coin money.<sup>74</sup>

7.54 On the other hand, some limitations on the legislative power of the territories put them in a different (and more restricted) position than the states. These exclusions tend to be greater in the case of the ACT because it contains the seat of

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- 69 R Lumb 'The Northern Territory and statehood' (1978) 52 *Australian Law Journal* 554, 555; G Nicholson 'Constitutionalism in the Northern Territory and other territories' (1992) 3 *Public Law Review* 50, 51–52; Grundy and others *Reluctant Democrats: The transition to self-government in the Australian Capital Territory* Federal Capital Press of Australia Canberra 1996, 7, 35–40, 218–219.
- 70 *Northern Territory Representation Act 1922* (Cth); *Australian Capital Territory Representation Act 1948* (Cth); *Australian Capital Territory Representation (House of Representatives) Act 1973* (Cth); *Senate (Representation of Territories) Act 1973* (Cth); see also *Western Australia v Commonwealth* (1975) 134 CLR 210; *Queensland v Commonwealth* (1977) 139 CLR 585.
- 71 As a result of the amendment to s 128 of the Constitution by the *Constitution Alteration (Referendums) Act 1977* (Cth).
- 72 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 69; *Northern Territory (Self-Government) Act 1978* (Cth) s 49.
- 73 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; but see D Mossop 'Time to reconsider Capital Duplicators' (1998) 5 *Canberra Law Review* 143.
- 74 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(d), (e), replicating s 114 and 115 of the Constitution as they apply to the states.

government of the Commonwealth.<sup>75</sup> For this reason the Commonwealth has used the ACT as the legislative base for national schemes such as the *Corporations Law* and the national scheme for classification of films, publications and computer games, which are consequently excluded from the ambit of the Legislative Assembly's powers.<sup>76</sup> A further example of disparity is that neither the ACT nor the Northern Territory legislature is empowered to make laws for the acquisition of property otherwise than on just terms.<sup>77</sup> Under s 51(xxxi) of the Constitution, this limitation currently applies to acquisitions by the Commonwealth, but not to those of the states. The Commonwealth also retains significant control over land management in Canberra.<sup>78</sup>

7.55 There is a significant difference between the ACT and the Northern Territory in the area of executive power. There is no representative of the Crown involved in the day-to-day running of government in the ACT whereas there is, in the form of the Administrator, in the Northern Territory.

7.56 There are also significant differences in terms of judicial power. The jurisdiction of the Supreme Court of the ACT is described in the Commonwealth legislation granting self-government.<sup>79</sup> However, the scope of Northern Territory Supreme Court's jurisdiction is not generally defined in Commonwealth legislation (though specific aspects of it are given by Part IXA JA), but in territory legislation — the *Supreme Court Act 1979* (NT).

7.57 Much Commonwealth legislation treats the ACT and the Northern Territory in the same manner as states.<sup>80</sup> Similarly, at a political level and for the purpose of the allocation of Commonwealth grants, these two territories are treated in much the same manner as states.

7.58 On the other hand, because of their different constitutional status it is clear that the Commonwealth retains greater legislative control over the territories than it does over the states. The most obvious recent example of this was the Commonwealth legislation that followed the enactment in the Northern Territory of the *Rights of the Terminally Ill Act 1995* (NT). That Act, made pursuant to the legislative powers granted to the Northern Territory Legislative Assembly under the *Northern Territory (Self-Government) Act 1978* (Cth), allowed persons with

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75 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23.

76 *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

77 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a); *Northern Territory (Self-Government) Act 1978* (Cth) s 50.

78 *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).

79 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 48A.

80 For example s 69A(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides 'If an Act (whether or not by express provision) binds each of the States, or the Crown in right of each of the States, that Act binds the Territory, or the Crown in right of the Territory, by force of this subsection, unless that Act specifically provides otherwise.' Section 51(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) is in the same terms. A further example is s 78AA JA.

terminal illness to undergo active voluntary euthanasia in limited circumstances. In response to this, the Commonwealth Parliament passed the *Euthanasia Laws Act 1997* (Cth), which not only specifically overrode the effect of the Northern Territory Act but also removed the power to pass laws allowing euthanasia from the legislative assemblies of the Northern Territory, the ACT and Norfolk Island. The passage of this Act emphasised that, although a degree of self-government has been granted to these territories, the Commonwealth Parliament still retains plenary power to legislate in relation to the territories, despite the views of the local legislature.<sup>81</sup>

7.59 The extent to which state courts are invested with federal jurisdiction is currently determined by the *Judiciary Act*. There are limitations on that investiture, such as those in s 39 JA, discussed in detail in Chapter 2. It would be possible to treat the courts of the territories in a similar fashion to the courts of the states, to the extent that the Constitution permits.

7.60 Alternatively, it would be possible to decide on a regime for the territories, which differed from that adopted in relation to the states. It would also be possible to treat some territories, such as the ACT and the Northern Territory, in a similar fashion to states and others in a different fashion more appropriate to their dependent circumstances. Finally, it would be possible to differentiate between the ACT and the Northern Territory on the basis that the ACT, while self-governing, contains the seat of government whereas the Northern Territory does not.

**Question 7.4.** To the extent that the Constitution permits, should the aim of any reform of the *Judiciary Act* be to put the ACT and the Northern Territory in a similar position to the states, in a similar position to each other, or both?

**Question 7.5.** To the extent that the Constitution permits, should the *Judiciary Act* allocate federal jurisdiction between federal courts and territory courts (namely those of the ACT and the Northern Territory) in the same way it allocates federal jurisdiction between federal courts and state courts?

81 G Williams & M Darke 'Euthanasia laws and the Australian Constitution' (1997) 20 *University of New South Wales Law Journal* 647. A similar issue has arisen in relation to mandatory sentencing in the Northern Territory: see Senate Legal and Constitutional References Committee *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* Parliament of the Commonwealth of Australia Canberra 2000.

## Background to Part IXA of the *Judiciary Act*

7.61 The *Northern Territory (Self Government) Act 1978* (Cth) granted self-government to the Northern Territory. Soon afterwards, the Commonwealth passed a group of related Acts to enable the Northern Territory government to assume responsibility for the Northern Territory Supreme Court.<sup>82</sup> One of these Acts repealed the 1961 Commonwealth legislation that had established the Northern Territory Supreme Court as a superior court of record.<sup>83</sup> This was done in contemplation of Northern Territory legislation to establish a Supreme Court in its own right. Amendments were also made to the *Judiciary Act*, principally by inserting a new Part IXA.<sup>84</sup>

7.62 The Commission's terms of reference ask it to inquire into and report on whether it is appropriate or necessary for similar provisions to be enacted for the ACT. The establishment of a Supreme Court for the Northern Territory under local legislative and executive control carried with it the assumption that Commonwealth legislation would generally not be applied directly to the Court.<sup>85</sup> However, an exception was made for the conferral of jurisdiction upon the Court in matters that may not have been within the competence of the Northern Territory legislature. In particular, Part IXA confers jurisdiction on the Northern Territory Supreme Court in relation to

- ?? suits between the Commonwealth and the Northern Territory (s 67B)
- ?? prerogative writs sought by the Commonwealth against the Northern Territory or its officers (s 67C(a))
- ?? prerogative writs sought against the Commonwealth or its officers in matters arising in the Northern Territory (s 67C(b)), and
- ?? certain other matters (discussed below at paragraph 7.90) that were historically part of the Supreme Court's jurisdiction when it was established under Commonwealth law (s 67C(c)).

7.63 Although the provisions were inserted in the *Judiciary Act* with effect from 1 October 1979, equivalent provisions had been inserted in the *Northern Territory Supreme Court Act 1961* (Cth), with effect from the date of self-government — 1 July 1978.<sup>86</sup>

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82 *Federal Court of Australia Amendment Act 1979* (Cth); *Northern Territory Supreme Court (Repeal) Act 1979* (Cth); *Judges Pensions Amendment Act 1979* (Cth); *Judiciary Amendment Act 1979* (Cth).

83 *Northern Territory Supreme Court (Repeal) Act 1979* (Cth).

84 *Judiciary Amendment Act 1979* (Cth).

85 *Hansard* (H of R) 22 August 1979, 460 (Viner), 598 (Bowen).

86 *Judiciary Amendment Act 1979* (Cth); *Northern Territory Supreme Court Amendment Act (No 2) 1978* (Cth).

7.64 In the case of the ACT, which was granted self-government in 1989, it was initially proposed that the transfer of responsibility for the judicial system be delayed indefinitely.<sup>87</sup> However, as a result of amendments in the Senate, the legislation that was ultimately passed required the final transfer of judicial power to be achieved by 1992. Responsibility for inferior courts was transferred in 1990 and responsibility for the Supreme Court was transferred in 1992.<sup>88</sup> No express powers analogous to those in Part IXA JA were enacted at this time.

7.65 As a consequence, the powers given to the Supreme Court of the Northern Territory in Part IXA are not expressly given to the Supreme Court of the ACT or, for that matter, the Supreme Court of the other territory that enjoys a degree of self-government, Norfolk Island.

### Suits between the Commonwealth and a territory

7.66 One of the functions of Part IXA is to confer jurisdiction on the Northern Territory Supreme Court in respect of suits between the Commonwealth and the Northern Territory. From 1 October 1979, s 67B JA has provided as follows:

The Commonwealth may bring a suit against the Territory, and the Territory may bring a suit against the Commonwealth, in the Supreme Court of the Territory in respect of a cause of any description, whether at law or in equity, including (but without limiting the generality of the foregoing) a claim in tort.

7.67 However, even before that date, the Commonwealth had made similar provision in the legislation establishing the Northern Territory Supreme Court. Between the date of self-government on 1 July 1978 and the repeal of the *Northern Territory Supreme Court Act 1961* (Cth) on 1 October 1979, s 15(1)(aa) of that Act provided:

15(1) The Supreme Court –

...

(aa) has jurisdiction in matters between the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, and the Territory, or a person suing or being sued on behalf of the Territory;

7.68 Suits between the Commonwealth and a state are made exclusive of the courts of the states. This is done by s 38 JA, pursuant to s 77(ii) of the Constitution. That section has the effect that such matters cannot be commenced in a state court, although if they are commenced in the High Court they may be remitted to a state

87 D Mossop 'The judicial power of the Australian Capital Territory' (1999) 27 *Federal Law Review* 19, 20–21.

88 *ACT Supreme Court (Transfer) Act 1992* (Cth).

or territory court pursuant to s 44 JA.<sup>89</sup> Certain suits between the Commonwealth and states can also be brought in the Federal Court.<sup>90</sup>

7.69 Suits between the Commonwealth and the Northern Territory are matters that are within the High Court's entrenched original jurisdiction, namely, s 75(iii) of the Constitution. As a result of s 67B such suits may also be litigated in the Northern Territory Supreme Court. The operation of s 67B overlaps with s 56 JA, which allows suits against the Commonwealth in tort or contract to be brought in the Northern Territory Supreme Court if the claim arose in that territory.

7.70 In relation to the Supreme Court of the ACT, there are no express provisions dealing with suits between the Commonwealth and the Territory in counterpart to s 67B. However, s 56 JA does allow suits brought by the Territory against the Commonwealth in contract or tort to be commenced in the ACT Supreme Court in certain circumstances.<sup>91</sup> While the ACT Supreme Court has entertained other cases which were, in substance, cases between the Territory and the Commonwealth,<sup>92</sup> it is not clear that the Court has jurisdiction to do so.<sup>93</sup>

7.71 The policy justification for allowing suits between the Commonwealth and the Northern Territory to proceed in the Supreme Court of the Northern Territory, while prohibiting suits between the Commonwealth and the states from being commenced in the states, is not clear. Proceedings between the Commonwealth and the ACT can proceed in the High Court but whether or not they may proceed in the Supreme Court of the ACT in all cases is also unclear.

**Question 7.6.** Should the *Judiciary Act* be amended to permit suits between the Commonwealth and the ACT to be commenced in the ACT Supreme Court in the same manner as s 67B provides in relation to the Northern Territory?

**Question 7.7.** Alternatively, should the *Judiciary Act* be amended so as to place the ACT and the Northern Territory in a similar position to the states by precluding the commencement of proceedings between the Commonwealth and either of those territories in the ACT or Northern Territory Supreme Courts?

89 See for example, *State Bank of NSW v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579.  
90 s 39B JA.

91 *Commonwealth v Silverton Ltd* (1997) 130 ACTR 1, 18–19.

92 *Attorney General (ACT) v Commonwealth* (Unreported) ACT Supreme Court 31 May 1990 (Miles CJ); on appeal to the Federal Court *Attorney General (ACT) v Commonwealth* (1990) 26 FCR 82.

93 *Australian Capital Territory (Self-Government) Act* 1988 s 27, 48A; s 64 JA.

## Prerogative relief in the territories

7.72 Prerogative relief refers to the traditional forms of relief available at common law for the purpose of preventing courts or officials from exceeding the limits of their power or of compelling them to exercise their powers according to law. Such relief is issued in the form of a writ directed to the person or body who is the subject of a complaint of error. Prerogative relief includes writs of mandamus, certiorari, prohibition, habeas corpus and quo warranto.

7.73 Section 67C JA provides:

The jurisdiction of the Supreme Court of the Territory extends to:

- (a) matters in which an injunction or declaratory order or writ of mandamus, prohibition or certiorari is sought by the Commonwealth against the Territory or an officer of the Territory;
- (b) matters in which a writ of mandamus or prohibition or an injunction is sought against the Commonwealth or an officer of the Commonwealth, being matters arising in, or under the laws in force in, the Territory; and
- (c) matters in which the Supreme Court of the Territory would, but for the repeal of the *Northern Territory Supreme Court Act 1961*, have jurisdiction by virtue of subsection 15(2) of that Act.

7.74 The reference in s 67C(c) to s 15 of the (now repealed) *Northern Territory Supreme Court Act 1961* (Cth) makes it necessary to refer to this provision, in order to understand the function of s 67C.<sup>94</sup> Section 15 provided

15(1) The Supreme Court –

- (a) has, subject to this and any other Act and to any Ordinance, in relation to the Territory, the same original jurisdiction, both civil and criminal, as the Supreme Court of South Australia had in relation to the State of South Australia immediately before 1 January 1911; ...
- (c) has jurisdiction in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, being matters arising in, or under the laws in force in the Territory; ...

(2) The jurisdiction of the Supreme Court of South Australia referred to in paragraph (a) of the last proceeding sub-section includes jurisdiction that the Court had as federal jurisdiction.

## Prerogative relief against territory officers

7.75 Section 67C(a) JA allows the Commonwealth to seek prerogative relief against the Northern Territory or against officers of the Territory in the Supreme Court of the Northern Territory. It ensures that, whatever the position taken by the Territory legislature in defining the jurisdiction of the Supreme Court of the Northern Territory, the Court will have jurisdiction to entertain proceedings of the nature described.

<sup>94</sup> s 67C(c) JA is discussed in detail in para 7.90–7.91.



7.76 In relation to the states, proceedings for prerogative relief by the Commonwealth against an officer of the state would be a suit between the Commonwealth and the state<sup>95</sup> and hence excluded from the jurisdiction of state courts by s 38 JA. Such proceedings could be brought in the High Court and then remitted to a state court pursuant to s 44(2) JA or, in some circumstances, would be within the jurisdiction of the Federal Court of Australia under s 39B(1A) JA.

7.77 There is no provision equivalent to s 67C(a) JA in relation to the ACT. Yet it might be argued that s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ensures that the Supreme Court of the ACT has broad enough jurisdiction to allow this sort of relief to be granted. That section provides, *inter alia*

The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

7.78 However the terms of the section are not precise and its effect has not been considered in any detail by the courts.

**Question 7.8.** Should the *Judiciary Act* be amended to permit the Commonwealth to commence proceedings in the ACT Supreme Court seeking prerogative relief against the ACT or an officer of the ACT, in the same manner as s 67C provides in relation to the Northern Territory?

**Question 7.9.** Alternatively, should the *Judiciary Act* be amended so as to place the ACT and the Northern Territory in a similar position to the states by precluding the Commonwealth from seeking prerogative relief against officers of the ACT or the Northern Territory in the Supreme Courts of those territories?

### **Prerogative relief against Commonwealth officers**

7.79 Section 67C(b) JA gives the Northern Territory Supreme Court the power to grant writs of mandamus or prohibition or an injunction against the Commonwealth or an officer of the Commonwealth in matters arising in, or under the laws in force in, the Northern Territory. Section 67C(b) simply re-enacts a power that the Supreme Court had possessed since the enactment of the *Northern Territory Supreme Court Act 1961* (Cth) (s 15(1)(c)). The power to grant writs of mandamus or prohibition was clearly appropriate prior to self-government, when

<sup>95</sup> *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363, 367; *State Bank of New South Wales v Commonwealth Savings Bank* (1986) 161 CLR 639, 648.

Commonwealth officials undertook the administration of the Territory. Although there remain significant numbers of Commonwealth officers in the Territory after self-government, the bulk of the administration is now carried out by officers of the Territory. This raises questions about the continued relevance or appropriateness of s 67C(b).

7.80 The position in the Northern Territory stands in marked contrast to that in the states. No proceedings may be brought in state courts for prerogative relief by way of mandamus or prohibition against officers of the Commonwealth. That is as a result of s 38(e) JA, which makes that aspect of federal jurisdiction exclusive of the several courts of the states. However, even prior to the enactment of the *Judiciary Act* it had been held that state Supreme Courts did not have that power because state courts could not compel a Commonwealth officer to obey the commands of the Commonwealth legislature.<sup>96</sup> In relation to writs other than mandamus or prohibition, s 9 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) precludes review by state courts (other than by a writ of habeas corpus) of administrative decisions to which that Act applies.

7.81 These limits on the jurisdiction of state courts may have incidental effects on certain Commonwealth territories. For example, the courts of Western Australia ordinarily exercise jurisdiction in respect of Christmas Island and the Cocos (Keeling) Islands, but they are very limited in their powers to restrain the conduct of Commonwealth officials in respect of those territories.

7.82 The position in respect of the ACT Supreme Court is complex. There is some doubt about the ability of the Supreme Court to entertain applications for prerogative relief against Commonwealth officers, in the absence of a specific provision in a Commonwealth Act authorising the Court to do so. That uncertainty may justify legislative reform of some description, though a question remains as to whether the best analogy is to be found in the contrary positions of the states or the Northern Territory.

7.83 Prior to the transfer of responsibility for the ACT Supreme Court to the ACT, the jurisdiction of the Supreme Court was defined by s 11 of the *Australian Capital Territory Supreme Court Act 1933* (Cth).<sup>97</sup> This section provided, inter alia, that the Supreme Court had the same jurisdiction in relation to the Territory as did the Supreme Court of New South Wales immediately before 1 January 1911 (the date on which the territory was surrendered by New South Wales and accepted by the Commonwealth). Such jurisdiction would have included federal jurisdiction

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<sup>96</sup> *Ex parte Goldring* (1903) 3 SR (NSW) 260.

<sup>97</sup> As originally enacted, this Act was entitled the *Seat of Government Supreme Court Act 1933* (Cth).

invested in the New South Wales Supreme Court by the *Judiciary Act*.<sup>98</sup> But equally it would have excluded those matters made exclusive of the courts of the states by s 38 JA, including matters in which a writ of mandamus or prohibition was sought against an officer of the Commonwealth (s 38(e)). The absence of the power to grant prerogative relief against officers of the Commonwealth was remedied by the *Supreme Court Ordinance 1952*, which expressly gave the ACT Supreme Court that power.<sup>99</sup>

7.84 However, soon after self-government the power was altered so as to allow the Court to grant relief against officers of the Territory rather than the Commonwealth.<sup>100</sup> After the transfer of the Court to the control of the Territory, the power was relocated to the *Supreme Court Act 1933* (ACT).<sup>101</sup> The specific jurisdiction provision, which gave the Supreme Court the same jurisdiction that the Supreme Court of New South Wales had before 1 January 1911, was removed and replaced with a general provision both in the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (s 48A) and the *Supreme Court Act 1933* (Cth) (s 20). The former section has already been referred to in paragraph 7.11–7.12 — it gives the Supreme Court all the original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

7.85 The precise scope of this provision is unclear because the nature and extent of the powers that are necessary for the administration of justice ‘in the Territory’ are nowhere precisely defined. It is certainly not clear whether, in relation to matters involving the Commonwealth or Commonwealth officers, the jurisdiction is broad enough to allow them to be bound by the orders of the Court. Section 27 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides that, except as provided by the Regulations, an enactment does not bind the Crown in right of the Commonwealth. Given that the *Supreme Court Act* itself is, following transfer, a Territory enactment it would appear that the powers exercised under that Act cannot bind the Commonwealth unless the power to do so is given by s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). Section 64 JA might have that effect, although the relationship between that provision and sections 27 and 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) is also unclear.

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98 The *Northern Territory Supreme Court Act 1961* (Cth) expressly stated in s 15(2) that it included federal jurisdiction. It is likely that the provisions of s 15 of the *Australian Capital Territory Supreme Court Act 1933* (Cth) had the same effect.

99 *Supreme Court Ordinance 1952* s 3. The explanatory memorandum for the Ordinance provided ‘There is considerable doubt as to whether the Supreme Court of the Australian Capital Territory has jurisdiction to entertain a suit for prohibition against a Commonwealth officer.’

100 *Self-Government (Consequential Amendments) Ordinance 1990* Schedule 1.

101 The *Supreme Court Act 1952* (ACT) was repealed and s 34B inserted in the *Supreme Court Act 1933* (ACT) by the *Supreme Court Amendment Act (No 2) 1993* (ACT).

7.86 Because the ACT Supreme Court has jurisdiction in relation to other territories (Australian Antarctic Territory, Heard and McDonald Islands and Jervis Bay Territory) the uncertainty as to its jurisdiction to grant writs against Commonwealth officers also affects those territories.

7.87 In relation to the ACT and the Northern Territory, the Federal Court has power to hear suits in which prerogative relief is sought against an officer of the Commonwealth.<sup>102</sup> It is also clear that the prohibition on reviewing Commonwealth decisions in s 9 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) does not apply to the Supreme Courts of these territories.<sup>103</sup>

7.88 The existence of s 67C(b) raises the question whether or not it is appropriate that territory Supreme Courts have power to grant prerogative relief against the Commonwealth or officers of the Commonwealth when that power is denied to Supreme Courts of the states. A starting point that is sensitive to the value of federalism is that the courts of one jurisdiction should only be involved in restraining actions in excess of power within their own system of government unless there is a constitutional mandate to do otherwise. The direct restraint or compulsion of an officer of the Commonwealth is a significant interference with the functions of the Commonwealth. On this basis it might be argued that it is appropriate that only federal courts grant such remedies. This appears to be the policy behind sections 38(e) and 39B(1) JA and s 9 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

7.89 On the other hand is the importance of restraining excesses of power and the maintenance of the rule of law. Issues of convenience tend in the direction of making that power readily available and accessible to those who might be affected by such power. That appears to have been the approach of the Commonwealth in relation to other aspects of federal jurisdiction in relation to matters affecting its interests, such as suits in which it is a party. Thus jurisdiction in s 75(iii) matters is conferred not only on the High Court (by virtue of the Constitution) but on all state courts exercising federal jurisdiction pursuant to s 39 JA. However, given the existence of the Federal Court and the reduced significance today of physical separation as an impediment to access to justice, issues of convenience may not provide a strong reason to favour allowing the courts of the states and territories to grant prerogative relief.

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102 s 39B(1) JA.

103 *Kelson v Forward* (1995) 60 FCR 39, 60.

**Question 7.10.** Is it appropriate for the Supreme Court of the Northern Territory to have power to grant prerogative relief against an officer of the Commonwealth?

**Question 7.11.** Does the Supreme Court of the ACT currently have power to hear suits in which prerogative relief is sought against an officer of the Commonwealth? Should that Court be expressly given such a power?

**Question 7.12.** Should the Supreme Courts of the ACT and the Northern Territory be put in a similar position to the courts of the states, which are expressly excluded from granting prerogative relief against an officer of the Commonwealth?

**Question 7.13.** Should the Supreme Courts of Western Australia and the ACT be given express power to grant prerogative relief against an officer of the Commonwealth when exercising their respective jurisdiction in relation to Christmas Island, Cocos (Keeling) Islands, Australian Antarctic Territory, Heard and McDonald Islands or the Jervis Bay Territory?

## **Historical jurisdiction of territory Supreme Courts**

7.90 Section 67C(c) JA confers jurisdiction on the Northern Territory Supreme Court in matters that were part of the Supreme Court's jurisdiction under s 15(2) of the *Northern Territory Supreme Court Act 1961* (Cth). Section 15(2) is reproduced in paragraph 7.74. The subsection has the effect of including in the jurisdiction of the Supreme Court the federal jurisdiction that was invested in the Supreme Court of South Australia on 1 January 1911. Once again, this limits the power of the Northern Territory legislature to confine the jurisdiction of the Supreme Court, although it is not clear why the legislature would wish to confine the jurisdiction of the Court so as to exclude matters of federal jurisdiction.

7.91 There is no equivalent provision in relation to the ACT, although s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) might prevent the ACT legislature from confining the scope of the ACT Supreme Court's jurisdiction.

**Question 7.14.** Should s 67C(c), which confers jurisdiction on the Northern Territory Supreme Court in matters that were part of the Supreme Court's jurisdiction under s 15(2) of the *Northern Territory Supreme Court Act 1961* (Cth), be modified in any way in relation to the Northern Territory? Should a similar provision be extended to the ACT?

## Executing a judgment against a territory

7.92 Section 67E JA provides

No execution or attachment, or process in the nature thereof, shall be issued against the property or moneys of the Territory.

7.93 This section is similar to the provision made in s 65 JA with respect to the execution of judgments in suits to which the Commonwealth or a State is a party, which is discussed in detail in Chapter 5. However, there are two significant differences between the sections. Section 67E does not provide a certification procedure such as that identified in s 65; nor is it combined with a provision such as s 66, which imposes an obligation on the Commonwealth or a State to satisfy a judgment against it 'out of moneys legally available'. There are, however, provisions relating to the satisfaction of judgments against the Northern Territory in the *Crown Proceedings Act 1993* (NT). Section 11 of that Act provides that, although a writ or warrant may not be issued against the Crown, the Administrator shall give directions as to how the judgment is to be satisfied and those directions must be carried out.

7.94 There is no such general protection from execution in either the *Judiciary Act* or the *Australian Capital Territory (Self-Government) Act 1988* (Cth) in relation to the ACT. Some protection is provided by the territory crown proceedings legislation — the *Crown Proceedings Act 1992* (ACT) s 13 — which as a result of s 27 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) does not bind the Commonwealth.

**Question 7.15.** Is the general immunity of the Northern Territory from execution contained in s 67E necessary or desirable? If so, should it be coupled with a federal statutory procedure for enforcement or a federal statutory obligation to satisfy the judgment, such as that in s 65?

**Question 7.16.** Should the *Judiciary Act* be amended to provide a general immunity from execution of judgments against the ACT? If so, should it be coupled with a statutory procedure for enforcement or a statutory obligation to satisfy the judgment, such as that in s 65?

**Question 7.17.** Should any immunity from execution against the Northern Territory or the ACT be set out in federal law, or is it sufficient to leave the regulation of this matter to the legislatures of those territories?

## Jurisdiction of the Federal Court

7.95 Section 39B(1A) JA provides:

The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

...

(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

7.96 This provision mirrors the terms of s 76(ii) of the Constitution, which in combination with s 77(i) allows the conferral of jurisdiction on federal courts in any matter ‘arising under any laws made by the Parliament’. A matter arises under a law made by the Parliament when it depends for its existence or enforcement upon such a law.<sup>104</sup> It need not involve the interpretation of such a law.<sup>105</sup>

7.97 In *Northern Territory v GPAO*<sup>106</sup> it was held that matters arising under laws made pursuant to s 122 of the Constitution were matters arising under laws made by the Parliament for the purposes of s 76(ii) of the Constitution.

7.98 Soon afterwards, *Eastman v R*<sup>107</sup> considered whether a matter arising under a statute of the ACT was a matter arising under a law made by the Parliament for the purposes of s 76(ii) of the Constitution. McHugh J, with whom Gummow J agreed, held that it was since such a law derived its force from the Commonwealth acceptance and self-government legislation.<sup>108</sup> It would therefore be a matter within the jurisdiction of the Federal Court pursuant to s 39B(1A)(c). This has the potential to expand significantly the original jurisdiction of the Federal Court.

104 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, 581–582; *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1980) 145 CLR 457, 468–469, 479–480; *Felton v Mulligan* (1971) 124 CLR 367, 373–374, 387–389, 402–403, 408–410.

105 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154.

106 (1999) 196 CLR 553.

107 (2000) 172 ALR 39.

108 (2000) 172 ALR 39, 74, 84–85. This is consistent with the views expressed previously in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582, 585; *Kruger v Commonwealth* (1997) 190 CLR 1, 168–169.

7.99 Similarly, common law matters might be said to arise under the Commonwealth legislation that continued the operation of laws in force prior to acceptance of the territory by the Commonwealth.<sup>109</sup> If the reference to ‘laws’ in these statutes includes the common law then the common law in Commonwealth territories may ultimately have a statutory basis. If this were so, common law claims in territories would arise under a law made by the Parliament and hence fall within the jurisdiction conferred on the Federal Court by s 39B(1A)(c) JA. In *Eastman v R*, McHugh J identified the jurisdiction of the Federal Court in relation to matters arising under the common law in a territory as raising ‘difficult questions’.<sup>110</sup>

7.100 If it were held that matters arising under the common law in a territory were matters arising under a law made by the Parliament, the Federal Court’s jurisdiction would include a wide array of civil matters in the territories. Indeed, a recent decision of Finn J in the Federal Court held that this is the case in respect of the common law of the ACT. In *O’Neill v Mann*<sup>111</sup> Finn J held that an action for defamation arising under the common law in force in the ACT was a matter arising under a law made by Parliament because of the actual course taken by Commonwealth law in erecting the legal system of the Territory.<sup>112</sup> In Finn J’s view, the legal system of the ACT

was put on a statutory footing from the outset with no operative difference in this regard being ascribed to the common law continued in force on the one hand and continued NSW statutes on the other. Both became the law in force in the Territory by force of a Commonwealth Act. The rights and duties countenanced by each owed their existence in the Territory to a Commonwealth law. To the extent that one or other or a combination of both provided rights and duties in justiciable controversies (or ‘matters’), those matters arose under laws made by the parliament.<sup>113</sup>

**Question 7.18.** Should s 39B(1A)(c) of the *Federal Court of Australia Act 1976* (Cth) be amended so as to exclude from the jurisdiction of the Federal Court common law matters arising in the territories?

**Question 7.19.** Alternatively, should s 39B(1A)(c) of the *Federal Court of Australia Act 1976* (Cth) be amended to include expressly common law claims arising in the territories?

109 For example, *Seat of Government Acceptance Act 1909* (Cth) s 6; *Northern Territory Acceptance Act 1910* (Cth) s 7.

110 (2000) 172 ALR 39, 74.

111 [2000] FCA 1180.

112 *Seat of Government Acceptance Act 1909* (Cth) s 6(1); *Seat of Government (Administration) Act 1910* (Cth) s 4.

113 [2000] FCA 1180, paragraph 29.



## Appeals from territory courts

7.101 Before the Federal Court was established in 1976, the High Court heard appeals from the Northern Territory, the ACT and Norfolk Island. When the Federal Court was established it became the court of appeal for the Northern Territory, the ACT and Norfolk Island in an effort to alleviate the burden on the High Court.<sup>114</sup> This situation still exists in relation to the ACT and Norfolk Island, but not the Northern Territory.

7.102 For the ACT, the typical situation is thus that a decision of a single judge of the ACT Supreme Court may be appealed as of right to a Full Court of the Federal Court and from there, by special leave, to the High Court.<sup>115</sup> Apart from the cross-jurisdictional nature of the first appeal, these arrangements replicate the appeal arrangements in place in respect of the states.

7.103 However, there is one situation in which it may be questioned whether the current avenue of appeal from the ACT Supreme Court to the Federal Court should continue, namely, where an appeal is taken from a decision of a Master to a Full Court of the ACT Supreme Court,<sup>116</sup> and from there to the Federal Court. One view is that the Full Court of the ACT Supreme Court should be treated in similar fashion to a Full Court of a state Supreme Court and the Court of Appeal of the Northern Territory so that second appeals do not go to the Federal Court but to the High Court by special leave. On this view, the current additional level of appeal to the Federal Court might be seen as unnecessary and productive of cost and delay.

7.104 An example of the operation of the current legislation is *John Pfeiffer Pty Ltd v Rogerson*<sup>117</sup> where the matter was initially heard by the Master of the ACT Supreme Court, then on appeal by right to the Full Court of the ACT Supreme Court, which led to an appeal by right to the Full Court of the Federal Court constituted by a panel of five judges. The matter was finally determined on appeal to the Full Court of the High Court comprised of seven justices. This four-step process, involving an original determination and three appeals (15 judges of appeal in all) might be avoided if the right of appeal from the ACT Supreme Court to the Federal Court did not extend to matters in which the ACT Supreme Court was comprised by a Full Court exercising appellate jurisdiction.

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114 s 24(1)(b) FCAA stated that 'Subject to this section and to any other Act, whether passed before or after the commencement of this Act (including an Act by virtue of which any judgments referred to in this section are made final and conclusive or not subject to appeal), the Court has jurisdiction to hear and determine — (b) appeals from judgments of the Supreme Court of a Territory.'

115 s 24(1)(b) FCAA with respect to an appeal to the Federal Court; s 33(3) FCAA with respect to an appeal to the High Court.

116 *Supreme Court Act 1933* (ACT) s 9(2).

117 (2000) 172 ALR 625.

7.105 Issues also arise in relation to the Northern Territory appellate hierarchy. In 1976 the channel for first appeals from a decision of the Northern Territory Supreme Court was redirected from the High Court to the Federal Court. When in 1978 the Northern Territory became self-governing there was disagreement over the appointment of Northern Territory Supreme Court judges as judges of the Federal Court for the purpose of hearing appeals.<sup>118</sup> Sections 51 to 60 of the *Supreme Court Act 1979* (NT) established the appellate jurisdiction of the Northern Territory Court of Appeal and required that this be exercised by not less than three judges of the Supreme Court. However, it was not until 1985 that the change to the appeal system for the Northern Territory was put into place to allow first appeals to be heard by the Full Court of the Northern Territory rather than the Federal Court.<sup>119</sup> Under the *Statute Law (Miscellaneous Provisions) Act (No 1) 1985* (Cth), s 24 FCAA was amended to qualify the Federal Court's jurisdiction to hear appeals from the territories. Section 24 now includes subsection (6) stating that

In sub-sections (1) and (2), 'Supreme Court of a Territory' does not include the Supreme Court of the Northern Territory.

7.106 The effect of change was to differentiate between the treatment of first appeals in the ACT (which generally went to the Federal Court) from those in the Northern Territory, which were generally appealed internally to the Northern Territory Court of Appeal.

7.107 In 1985 the *Judiciary Act* was also amended to include section 35AA JA, which allows appeals to go from the Supreme Court of the Northern Territory to the High Court, subject to special leave being granted.<sup>120</sup>

- (1) Subject to sub-sections (2) and (3), the High Court has jurisdiction to hear and determine appeals from judgments of the Supreme Court of the Northern Territory.
- (2) An appeal shall not be brought from a judgment, whether final or interlocutory, referred to in sub-section (1) unless the High Court gives special leave to appeal.
- (3) Sub-section (1) has effect subject to any special provision made by an Act other than this Act, whether passed before or after the commencement of the section, preventing or permitting appeals from the Supreme Court of the Northern Territory.

7.108 Section 35AA JA simply refers to the Supreme Court of the Northern Territory and not to the Full Court of that Court or to its Court of Appeal. It therefore appears open for an appeal to the High Court to be brought from a judgment of a single judge of the Supreme Court of the Northern Territory exercising original jurisdiction. This result runs counter to the general position that appeals to the High Court emanate from decisions of intermediate appellate courts.<sup>121</sup> In practice in the Northern Territory, appeals to the High Court are not

118 J Crawford *Australian courts of law* 3<sup>rd</sup> ed Oxford University Press Melbourne 1993, 137.

119 *ibid.*

120 *Statute Law (Miscellaneous Provisions) Act (No 1) 1985* (Cth).

121 s 34 JA, relating to appeals from a single justice of the High Court, is a notable exception.

considered except where brought from the Court of the Appeal of the Northern Territory. One issue is whether s 35AA should be amended to make it clear that appeals to the High Court from the Northern Territory can be brought only from a decision of the Northern Territory Supreme Court exercising appellate jurisdiction. As discussed in Chapter 4, similar arguments can be raised in relation to appeals from state Supreme Courts under s 35 JA.

7.109 Whether one can block the channel of appeal from a single judge of a territory court exercising original jurisdiction to the High Court is perhaps an open question. The answer depends in part on whether a territory court is a federal court or a court exercising federal jurisdiction;<sup>122</sup> and in part on whether the prohibition can be regarded as an ‘exception’ or ‘regulation’ of the right of appeal conferred by s 73 of the Constitution. By way of analogy, the *Federal Magistrates Act* purports to prohibit an appeal to the High Court directly from a federal magistrate, but does so in a manner that recognises the contested nature of the constitutional question.<sup>123</sup>

7.110 As noted above, under s 35AA JA, appeals from the Supreme Court of the Northern Territory are subject to special leave to the High Court but there is no corresponding provision in relation to the Supreme Court of the ACT. Appeals from the latter are heard by the Federal Court as of right. There appears to be no articulated policy or legal reason for this difference in treatment between the two territories.

7.111 The appeal arrangements for the Northern Territory put it in the same position as the state Supreme Courts and it might be argued that, as a matter of parity, appeals from the ACT Supreme Court to the High Court should also be available, subject to the grant of special leave to appeal.

**Question 7.20.** Should the Federal Court continue to be used generally as an intermediate appellate court for appeals from the ACT?

**Question 7.21.** If so, should an exception nevertheless be made in relation to appeals to the Federal Court from a Full Court of the ACT Supreme Court exercising its appellate jurisdiction?

**Question 7.22.** To the extent that the Constitution allows, should s 35AA of the *Judiciary Act* be amended to make it clear that that appeals can only be brought to the High Court from a decision of the Northern Territory Supreme Court when that court has exercised its appellate jurisdiction?

122 *Northern Territory v GPAO* (1999) 196 CLR 553.

123 s 20(1), (3) FMA. See Ch 4.

**Question 7.23.** Should the *Judiciary Act* be amended to allow appeals from the Supreme Court of the ACT directly to the High Court, subject to the grant of special leave, in the same way as the Act makes provisions for appeals from the Northern Territory and the States?

## 8. Location, consolidation and simplification

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### Introduction

8.1 This Chapter considers the location, consolidation and simplification of provisions in the *Judiciary Act* and whether some of those provisions would be better placed in other legislation or repealed altogether. The Commission's terms of reference exclude consideration of the provisions of the *Judiciary Act* dealing with criminal jurisdiction, which are largely contained in Part X of the Act. Consequently, this Chapter will not comment specifically on the location of those provisions. However, the general considerations identified in this Chapter are likely to be relevant to that inquiry as well.

8.2 The terms of reference ask the Commission to consider

- ?? the need for clear and comprehensive legislative provisions for the exercise and distribution of the judicial power of the Commonwealth, and
- ?? whether the procedural provisions dealing with the High Court included in the *Judiciary Act* would be better placed in another Act.

8.3 Also relevant to this discussion is the Commission's obligation under s 21 of the *Australian Law Reform Commission Act 1996* (Cth) to consider 'simplifying the law', 'proposals for consolidating Commonwealth laws' and 'proposals for the repeal of obsolete or unnecessary laws' in relation to matters referred to it by the Attorney-General.

8.4 In addressing these questions, it is neither possible nor desirable to confine attention to the location and consolidation of those provisions of the *Judiciary Act* that have been considered in detail in previous chapters. This is because issues of location raise general questions of the structure of both this Act and related Acts.

## Searching for a unifying theme

8.5 A key factor in determining the appropriate content of the *Judiciary Act* and its relation to other Acts is to ascertain its underlying purpose — a unifying theme. When the *Judiciary Act* was originally enacted in 1903, the long title described it as ‘An Act to make provision for the exercise of the judicial power of the Commonwealth’. At the time, there were no federal courts other than the High Court, which was established by the Act. Nor were any Commonwealth territories in existence, so that no account had to be taken of the exercise of judicial power in the territories (see Chapter 7).

8.6 As originally enacted, the *Judiciary Act* comprised eleven parts as follows:

- I Preliminary (s 1–3)
- II Constitution and Seat of the High Court (s 4–14)
- III Jurisdiction and Powers of the High Court (s 15–29)
- IV Original Jurisdiction of the High Court (s 30–33)
- V Appellate Jurisdiction of the High Court (s 34–37)
- VI Exclusive and Invested Jurisdiction (s 38–39)
- VII Removal of Causes (s 40–46)
- VIII Members and Officers of the High Court (s 47–55)
- IX Suits by and against the Commonwealth and the States (s 56–67)
- X Criminal Jurisdiction (s 68–77), and
- XI Supplementary provisions (s 78–87).

8.7 The *Judiciary Act* made provision for the exercise of the judicial power of the Commonwealth in relation to many of the matters addressed in detail in other chapters of this Discussion Paper. For example, the Act conferred original jurisdiction on the High Court (s 30),<sup>1</sup> invested federal jurisdiction in state courts (s 39), provided for references to be made to a Full Court of the High Court (s 18), enabled applications for leave to appeal (s 21) and authorised the removal of causes (s 40).

8.8 The central place of the *Judiciary Act* in establishing the federal judicial system made it certain that the Act would require amendment as that system evolved. Indeed, the Act has been amended by approximately 70 separate pieces of legislation over its 97-year lifetime. The history of amendments to the *Judiciary*

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<sup>1</sup> This jurisdiction was additional to that conferred directly on the High Court by s 75 of the Constitution.

*Act* reveals some interesting features that bear on the location of legislative provisions.<sup>2</sup> In particular there are three broad developments that have affected the location of provisions in the *Judiciary Act* and related Acts.

8.9 The first of these is that, since 1903, the institutions for exercising federal judicial power have been extended to federal courts other than the High Court. Today these courts are the Family Court, the Federal Court and the Federal Magistrates Court.<sup>3</sup> Specific legislation has been enacted to establish each of these courts,<sup>4</sup> but the interrelationships between each court and others in the federal judicial system have repercussions for the content of the *Judiciary Act*. It is also now apparent that territory courts may exercise the judicial power of the Commonwealth, lending further complexity to the system.<sup>5</sup>

8.10 The second development is that some limited measures have already been taken to relocate provisions between the *Judiciary Act* and related Acts. For example, in 1979 Part II of the *Judiciary Act* (Constitution and Seat of the High Court) and Part VIII (Members and Officers of the High Court) were moved into the newly enacted *High Court of Australia Act 1979* (Cth). The latter Act was described in Parliament at the time as one to allow the High Court to manage its own affairs and to be responsible for its building, staff and financial management.<sup>6</sup> However, that Act also made provision for structural and organisational aspects of the High Court and was thus seen as an appropriate location for Parts II and VIII of the original *Judiciary Act*. A further example of relocation occurred in 1979 when Parts II and III of the *High Court Procedure Act 1903* (Cth) (which had been enacted contemporaneously with the *Judiciary Act*)<sup>7</sup> were moved into the *Judiciary Act*.<sup>8</sup> Those parts are still located in the *Judiciary Act* as Parts XA (Procedure of the High Court) and XB (Appeals to the High Court).

8.11 It might have been thought that the parliamentary debates on the Bill that effected these changes would reveal something of the reasons for the changed location.<sup>9</sup> However, apart from describing the changes outlined above, the

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2 The relative absence of parliamentary discussion about issues of location, consolidation and simplification of legislation limit the gains from any detailed examination of these amendments.

3 Other federal courts established since federation, but now abolished, include those dealing with bankruptcy and industrial law. See R French 'Federal Courts Created by Parliament' in B Opeskin & F Wheeler (eds) *The Australian Federal Judicial System* Melbourne University Press Melbourne 2000, 123–159.

4 *Family Law Act 1975* (Cth); *Federal Court of Australia Act 1976* (Cth); and *Federal Magistrates Act 1999* (Cth).

5 *Northern Territory v GPAO* (1999) 196 CLR 553.

6 *Hansard* (H of R) 25 October 1979, 2500.

7 The *Judiciary Act* was Act No 6 of 1903; the *High Court Procedure Act 1903* (Cth) was Act No 7 of 1903.

8 The *High Court Procedure Act 1903* (Cth) was repealed upon enactment of the *High Court of Australia Act 1979* (Cth).

9 *Judiciary Amendment Act (No 2) 1979* (Cth).

Minister's second reading speech gave no indication as to why the provisions were relocated in this way.<sup>10</sup>

8.12 The third development has been the very large number of piecemeal amendments to the *Judiciary Act*, beyond those already mentioned. Many of these amendments appear to be consistent with the purpose of the Act as stated in its long title, in so far as they make provision for the exercise of the judicial power of the Commonwealth. Among these amendments are those designed to reduce the workload of the High Court and those relating to practice and procedure of federal courts. One might also include within this category those amendments that make provision for the exercise of the judicial power in the territories, such as the insertion of Part IXA relating to the Northern Territory in 1979. Although there is debate about whether this involves the exercise of federal judicial power (see Chapter 7), these amendments provide for the exercise of judicial power under Commonwealth law and might therefore seem appropriate for inclusion in the *Judiciary Act*.

8.13 By contrast, there is considerable doubt about the consistency of many piecemeal amendments with the original purpose of the Act. Over the years new Parts have been introduced, which have transformed the Act from one dealing solely with the exercise of the judicial power of the Commonwealth to one of far broader compass. This can be seen in relation to the following Parts which have been inserted into the *Judiciary Act*.

- ?? Part VIII — Enforcement of Certain orders Concerning Court Proceedings
- ?? Part VIIIA — Legal Practitioners
- ?? Part VIIB — The Australian Government Solicitor, and
- ?? Part VIIC — Attorney-General's Legal Services Directions.

8.14 Many of these amendments, which are described in greater detail below, have no direct connection to the exercise of the judicial power of the Commonwealth. That change in approach raises the issue of whether the original purpose of the Act is still appropriate and what types of provisions should be in the Act.

8.15 This discussion leads to the question of whether the *Judiciary Act* has what an early review of the legislative process in Great Britain (the Renton report) called a 'separate and easily identifiable' subject matter of its own.<sup>11</sup> One possibility is that the subject matter of the Act should be 'the judicial power of the Commonwealth', as indicated in the original long title and preserved in the current long title of the Act. On one view, such a topic is too broad for a single piece of

<sup>10</sup> *Hansard* (H of R) 25 October 1979, 2501.

<sup>11</sup> Great Britain Committee on the Preparation of Legislation *The preparation of legislation: report of a committee appointed by the Lord President of the Council* HMSO London 1975, 33 (Renton report).



legislation, at least if the topic is treated comprehensively. For example, all matters dealing with the High Court, the Federal Court, the Family Court and the Federal Magistrates Court involve the exercise of the judicial power of the Commonwealth. Taken to its logical conclusion their constituting Acts would be subsumed by the *Judiciary Act*. The result would be unmanageable, since such an Act would be long, complex and cover an extremely wide range of topics.

8.16 An alternative is to confine the *Judiciary Act* to provisions that are concerned with the inter-jurisdictional aspects of federal judicial power, and to matters that are relevant to the exercise of federal judicial power, irrespective of the particular court in which the jurisdiction is being exercised. The long title of the Act could be amended to reflect such a change.

8.17 If the *Judiciary Act* were confined in this way, those provisions that confer jurisdiction, powers or functions on a federal court could be located in the legislation establishing that court. For example, a provision concerned only with the jurisdiction of the High Court or the practice and procedure of the High Court should be located in the *High Court of Australia Act*. This would not be possible in respect of some matters because of the inability of the Commonwealth Parliament to regulate the primary legislation in question. Thus, s 39 JA, investing federal jurisdiction in state courts, could not be relocated to a state Act. Even though the section relates to the jurisdiction of state courts, the power of investiture is vested in Commonwealth Parliament and must be exercised through federal legislation. For similar reasons, some provisions relating to the exercise of judicial power in the territories must fall to federal law.

**Question 8.1.** Does the original object of the *Judiciary Act* as one concerning ‘the exercise of the judicial power of the Commonwealth’ still reflect the underlying purpose of the Act?

**Question 8.2.** Should the long title of the *Judiciary Act* be changed to reflect the diverse content of the Act, or should the content of the Act be changed to reflect the unifying theme of the Act as expressed in its long title?

## **Arguments for relocating and consolidating provisions**

8.18 There are no formal guidelines for determining the location of legislative provisions, or for consolidating or renumbering them.<sup>12</sup> Hilary Penfold has noted in relation to legislative drafting that

<sup>12</sup> H Penfold First Parliamentary Counsel *Consultation* 22 February 2000.

While it is true that most Bills go through basically similar processes before introduction, it is also fair to say that each Bill goes through a unique process from conception to introduction. As well, hardly any of the rules and practices that do exist are immutable.<sup>13</sup>

8.19 These comments suggest a great deal of fluidity in approaching questions of location, consolidation and simplification of provisions. However, as with the drafting of legislation generally, key factors to be considered in addressing these questions are those of logic, relevance, coherence and accessibility. These factors are highly interrelated and are discussed together below.

### Clear structure and operation of legislation

8.20 Legislative provisions should be located such that the objectives, structure and operation of the legislation are as clear as possible.<sup>14</sup> In pursuit of that objective, in 1975 the Renton report noted that there should be a separate and easily identifiable major Act for each subject on which there is legislation.<sup>15</sup> In Australia, the House of Representatives Standing Committee on Legal and Constitutional Affairs in its 1993 report, *Clearer Commonwealth Law*, identified the logical ordering of provisions in legislation as an important aspect of drafting.<sup>16</sup>

8.21 The criteria of relevance and coherence suggest that, as far as possible, all provisions that are concerned with the same subject matter should be located within a single piece of legislation, unnecessary provisions should be repealed, and unrelated provisions should be relocated to more appropriate legislation.

### Related Acts

8.22 In assessing whether the relocation of provisions is feasible and desirable, it is necessary to consider whether other Acts exist that contain similar or related provisions. For example, the *High Court of Australia Act* contains provisions concerning the practice and procedure of the High Court, as does the *Judiciary Act* (Parts XA and XB). The task of considering relocation involves considering both the *Judiciary Act* and potential 'recipient' Acts, whether already in existence or otherwise.

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13 H Penfold 'The Genesis of Laws' in *Courts in a Representative Democracy* AIJA Melbourne 1995, 29.

14 S Mason 'Law-making, drafting and law reform' in D St L Kelly (ed) *Essays on Legislative Drafting* Adelaide Law Review Association University of Adelaide 1988, 112–113.

15 Renton report, 33.

16 House of Representatives Standing Committee on Legal and Constitutional Affairs *Clearer Commonwealth Law* AGPS Canberra 1993, 111–114.

**Accessibility**

8.23 The location and structure of legislative provisions also have an important bearing on the accessibility of the law to those who need to refer to it. Any consideration of accessibility must take into account the fact that an Act has many ‘audiences’ with different needs.<sup>17</sup> It has been said that the intentions of the sponsors of the legislation

need to be conveyed to a variety of different audiences, each individual member of which brings to the process of interpretation a unique set of pre-conceptions, life experiences and understanding of language.<sup>18</sup>

8.24 There are no data available about who uses the *Judiciary Act* and related legislation, or about the frequency or extent of that use. One group of certain users is comprised of federal, state and territory judges, whose knowledge of the Act is likely to be high, especially in federal courts.

8.25 A second audience is legal practitioners involved in proceedings in federal courts and, to a lesser extent, practitioners involved in matters falling within federal jurisdiction in state and territory courts. Similarly, Australian Government Solicitor (AGS) lawyers use the *Judiciary Act* not only in relation to matters of federal jurisdiction, but because the Act provides for the establishment and functions of the AGS. The *Judiciary Act* is also used by the AGS in proceedings involving claims against the Commonwealth (see Chapter 5) and in s 78A JA intervention applications (see Chapter 3).

8.26 It should not be assumed that all legal practitioners are experienced users. Some practitioners who need to use the legislation may have little experience with the exercise of federal jurisdiction and might be unfamiliar with the sources of law relevant to an occasional case. Gummow J has remarked on the lack of knowledge of some practitioners in the following terms.

There remains a great deal of ignorance in the legal profession concerning federal jurisdiction, both in its constitutional outlines and its detailed application. This is so even among those whose legal practices oblige them to know better. How can it still be, in the face of the exclusion of the Supreme Courts by s 38 of the *Judiciary Act 1903* (Cth), which has been amended only once in nearly a century, that counsel commence in a state Supreme Court actions for mandamus against Ministers for the Commonwealth, apparently relying on the general investment of federal jurisdiction by s 39 of that Act? In an action brought in a state court between residents of different states, even on a common law cause of action, the jurisdiction exercised is federal and

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<sup>17</sup> Renton report, 37.

<sup>18</sup> H Penfold ‘The Genesis of Laws’ in *Courts in a Representative Democracy* AIJA Melbourne 1995, 41. See also House of Representatives Standing Committee on Legal and Constitutional Affairs *Clearer Commonwealth Law* AGPS Canberra 1993.

ss 79 and 80 of the *Judiciary Act* pick up the law of that state (not just its procedural law) as surrogate federal law. However, one gets the impression from time to time that federal jurisdiction is exercised without those doing so appreciating it.<sup>19</sup>

8.27 A third audience is comprised of the considerable number of litigants in person who may need to consider the *Judiciary Act* and related legislation in the course of litigation in the High Court or other federal courts. It is likely that a majority of unrepresented parties would be unaware of the existence of the *Judiciary Act* without specific assistance.

8.28 The accessibility of the law to unrepresented parties has become increasingly important due to the increase in the number of litigants in person appearing before many Australian courts. For example, the High Court has noted that during the 1999–2000 financial year the number of unrepresented parties appearing before the Court remained ‘high’. In particular

- ?? 13 per cent of matters heard before a single judge involved unrepresented litigants, and
- ?? applicants were unrepresented in 29 per cent of the civil special leave applications filed.<sup>20</sup>

8.29 Unrepresented parties require legislation that is readily identifiable, easily located, comprehensive, and easily understood — rather than having to consider piecemeal legislation that deals with interrelated issues.<sup>21</sup> This is even more so with the rise in the volume of complex legislation.<sup>22</sup>

8.30 It might be argued that the *Judiciary Act* is currently not particularly accessible for a number of reasons. Its title does not clearly relate to its subject matter and seems to foreshadow legislation about judges rather than about judicial power and the jurisdiction of courts. It contains a diverse range of topics that have no necessary connection with each other. These include provisions dealing with the allocation of jurisdiction, High Court practice and procedure, the AGS, the Attorney-General’s Legal Services Directions, and the legal consequences of a particular incident involving the Australian Secret Intelligence Service (ASIS) in 1983, as discussed in paragraphs 8.57–8.61. The subject matter of the Act is also dealt with by other related pieces of legislation. There are thus issues of over-inclusion and fragmentation within the *Judiciary Act* and related legislation.

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19 W Gummow ‘Preface’ in B Opeskin and F Wheeler (eds) *The Australian Federal Judicial System* Melbourne University Press Melbourne 2000, vi–vii.

20 High Court of Australia *Annual report 1999–2000*, 5.

21 These issues are discussed in more detail in Australian Law Reform Commission *Managing Justice: A review of the federal civil justice system* (ALRC 89) ALRC Sydney 2000, para 4.56–4.61.

22 M McHugh ‘The growth of legislation and litigation’ (1995) 69 *Australian Law Journal* 37, 38.

8.31 One partial remedy for the problem of accessibility might be to relocate provisions dealing with the original or appellate jurisdiction of a particular court to legislation that establishes that court. This would satisfy the demands of logic and coherence since a single Act would provide for the establishment of the court, the appointment of its judges and other personnel, the powers of the court, and its original and appellate jurisdiction.

8.32 Another potential remedy is the inclusion within each Act of notes and cross-references to other relevant sources of law. In a modest way, one section of the *Judiciary Act* already does this in indicating that the High Court's jurisdiction comes from constitutional as well as statutory sources. Section 30 provides

In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have original jurisdiction:  
(a) in all matters arising under the Constitution or involving its interpretation; and  
(b) in trials of indictable offences against the laws of the Commonwealth.

8.33 The *Federal Magistrates Act* goes much further than this in providing cross-references to other relevant legislation. This approach is consistent with the government's policy of enhancing access to justice through 'streamlined, more user-friendly procedures and less formal atmosphere'.<sup>23</sup> The *Judiciary Act* and related legislation do not currently contain comprehensive cross-referencing, although occasional cross-references can be found as a result of piecemeal amendment.<sup>24</sup>

**Question 8.3.** What criteria should be used to determine the location of particular provisions in the *Judiciary Act* and related legislation? How should factors such as logic, relevance, coherence and accessibility impact on the location of legislative provisions?

**Question 8.4.** What measures should be taken in respect of the location or consolidation of provisions to facilitate access to the law by judges, legal practitioners, unrepresented parties and other users of the legislation?

**Question 8.5.** Should new legislation that relates to the *Judiciary Act* include notes or cross-references to the *Judiciary Act* and other related legislation?

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<sup>23</sup> D Williams *Federal Magistrates Service Fees* Attorney-General News Release 7 June 2000.

<sup>24</sup> See eg s 55M and s 55N JA.

## Arguments against relocation

8.34 Any assessment of relocation or consolidation of provisions of the *Judiciary Act* must address a number of arguments against change.

### Familiarity with the current location

8.35 Many sections of the *Judiciary Act* have been located in that Act for nearly 100 years. Experienced practitioners who use the Act on a regular basis are familiar with the current location of the sections. Some provisions are used with such frequency that their identifying numbers have become part of the legal lexicon. An example is the ‘s 78B notice’, requiring a court to halt pending proceedings until notice has been given to all Attorneys-General in any cause involving a matter arising under the Constitution or involving its interpretation (see Chapter 3). Closely related to this argument is the attachment that some people may feel for the existing structure and location of provisions, which were enacted in the first years of federation and set out enduring aspects of the Australian judicial system.

### Unforeseen consequences

8.36 A further concern is that relocating provisions may affect the interpretation of the relevant statutes. This concern arises because statutory provisions take their meaning from the context in which they are located. The *Judiciary Act* provides examples of this, such as the way in which some provisions of Part IX have been held to be limited to matters of federal jurisdiction, despite the absence of an express limitation to that effect.<sup>25</sup> The change in context may affect the meaning not only of those provisions moved but of those that remain.

### Costs and delays

8.37 There are significant initial costs and delays involved in drafting and enacting new legislation to relocate provisions, together with any consequential amendments to other Acts. This is a particular problem in relation to the relocation of parts of the *Judiciary Act* because of the possibility that those other Acts will themselves require re-organisation to avoid the same problems that provoked the initial changes to the *Judiciary Act*. However, these initial costs must be weighed against the longer term cost savings to all users of the federal civil justice system as a result of clearer and more coherent law. Increased clarity might reduce litigation about the meaning or application of *Judiciary Act* provisions.

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<sup>25</sup> For example, s 58 JA in relation to claims against a state has been interpreted as applying only to suits in federal jurisdiction as opposed to all claims against a state: see *Commissioner of Railways of Queensland v Peters* (1991) 24 NSWLR 407.

### Transitional provisions

8.38 Some legislative changes may involve the additional complexity of transitional provisions. This might result in the concurrent operation of two legal regimes — the old and the new. Given the length of time that a case can take to pass through all potential stages of litigation — from trial, to intermediate appeal, to final appeal — the period of concurrency of two regimes may not be insignificant.

**Question 8.6.** Do the arguments against relocation or consolidation of provisions justify retaining the current legislative arrangements either in whole or in part?

### Renaming the Act

8.39 This section and those following consider a number of specific issues against the criteria of logic, relevance, coherence and accessibility addressed above.

8.40 Like many of the provisions of Chapter III of the Constitution, the title of the *Judiciary Act* was borrowed from the United States legislation of the same name.<sup>26</sup> It is arguable that the present title of the Act does not satisfy the criteria referred to. Whatever its meaning in 1903 (or 1789), the term ‘judiciary’ is today usually used to refer collectively to the judges who comprise a court system, rather than to the court itself, or its jurisdiction. The title *Judiciary Act* is therefore not only inaccurate but potentially misleading for those who may need to use the legislation. On this view, thought should be given to choosing a new title for the Act, which better reflects its content, such as the ‘Judicial Power of the Commonwealth Act’. An alternative view is that the historical significance of the title merits its retention in any revised Act.

**Question 8.7.** Should the *Judiciary Act* be renamed to describe its contents more accurately? If so, what name might be appropriate?

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26 *Judiciary Act 1789* (US). For an historical account see M Marcus (ed) *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* Oxford University Press New York 1992.

## Renumbering the sections of the Act

8.41 In its present form, the *Judiciary Act* bears the hallmarks of any Act that has been subject to frequent legislative amendment. There are gaps in the numbering of sections (sections 4 to 14 are missing), and many sections have to be identified by one or more letters (eg s 77A–77V; s 78AA).

8.42 In this respect, the *Judiciary Act* is by no means unique, nor is it a particularly bad example of the phenomenon, when compared with statutes in the areas of taxation or corporate regulation. However, if further substantial changes are made to the Act, a real question might arise as to the desirability of renumbering the Act.

8.43 Different views might be taken of the need for renumbering. Thornton has suggested that as a general rule, where a paragraph, subsection or section is inserted or repealed, subsequent paragraphs, subsections or sections should not be renumbered, particularly where there are existing cross-references.<sup>27</sup> The status quo also has the advantage of avoiding changes to sections that are readily identified by their numbering, such as ‘s 78B notices’. However, this rule, while appropriate for minor changes to an Act, may not be readily applicable in the face of major legislative change. In these circumstances consecutive numbering provides ease of use and promotes accessibility, particularly if it provides an opportunity for re-organisation of the statutory material. It might also be argued that the audience of the *Judiciary Act* is relatively small in comparison with aspects of commercial law, so that any change in numbering might be assimilated quickly and with minimal inconvenience to specialist users. Litigants in person may face greater problems.

**Question 8.8.** If major amendments are made to the content of the *Judiciary Act*, should the Act be renumbered?

## Removing unnecessary or obsolete provisions

8.44 The concept of the ‘rule of law’ encompasses the idea that individuals should be able to plan their lives on the basis of known or ascertainable legal rules, which are reasonably stable and accessible.<sup>28</sup> Having obsolete provisions on the statute book undermines the rule of law because it gives people potentially confusing information about their legal rights and liabilities and makes it more difficult to ascertain the relevant legal provisions. For this reason, unnecessary, obsolete or spent statutory provisions ought to be repealed.

<sup>27</sup> G Thornton *Legislative Drafting* Butterworths London 1987, 346.

<sup>28</sup> J Raz *The Authority of Law: Essays on Law and Morality* Clarendon Press Oxford 1979, 215; F Hayek *The Road to Serfdom* Routledge London 1946, 72.



8.45 The *Judiciary Act* contains a number of provisions that might be considered unnecessary or obsolete. The following sections focus on two particular examples — sections 82 to 84, which relate to the venue for the recovery of pecuniary penalties, taxes and forfeiture, and Part VIII, which relates to a specific incident involving ASIS in 1983.

### **Venue for penalties, taxes and forfeiture**

8.46 Three sections of the *Judiciary Act* provide specifically for venue in suits concerning pecuniary penalties and forfeiture (s 82), taxes (s 83), and seizures made on the high seas (s 84). These provisions were included in the *Judiciary Act* as originally enacted and remain as they were except for amendments in 1959 to refer to the territories as well as the states.<sup>29</sup> There is no case law that considers their meaning.

8.47 Section 82 provides that suits to recover pecuniary penalties and forfeitures under Commonwealth laws may be brought either in the state or territory where they accrue or in the state or territory where the offender is found.

8.48 Under s 83, suits to recover taxes accruing under any revenue law of the Commonwealth may be brought either in the state or territory where the liability for the tax occurs or in the state or territory where the debtor resides. Section 85 is ancillary to s 83 in that it provides that all property taken or obtained by any officer or person under the authority of any revenue law of the Commonwealth shall be deemed to be in the custody of the law, and subject only to the orders and judgments of the courts having jurisdiction under any Act.

8.49 Section 84 states that proceedings on seizures made on the high seas for forfeiture under any Commonwealth law may be prosecuted in any state or territory into which the property seized is brought. Proceedings on such seizures made within any state or territory shall be prosecuted in the state or territory where the seizure is made, except in cases when it is otherwise provided by law.

8.50 Sections 82 and 83 are almost verbatim reproductions of sections in the United States Code,<sup>30</sup> which was first consolidated with the publication of the Revised Statutes in 1875. It is very likely that the statutory codification would have been available to the drafters of the *Judiciary Act* in 1903. The current United States Code still contains very similar provisions.<sup>31</sup>

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29 *Judiciary Act 1959* (Cth) s 11.

30 The marginal notes to s 82, 83, 84 and 85 of the 1903 print of the *Judiciary Act* contain references to US 732, 733, 734 and 934, respectively.

31 See 28 USC s 1395(a), 1396, 1395(c) (1994, Supp 3) with respect to venue in suits for penalties, taxes and forfeiture, respectively.

8.51 The origin of these provisions in United States law raises the question of their continued suitability to Australian circumstances. The reason for the potential unsuitability is that the United States District Court and the United States Court of Appeals (which reviews District Courts' decisions) are territorially organised federal courts, for which there is no Australian equivalent. As Chemerinsky has commented in relation to the United States

Federal district courts are the primary courts of original jurisdiction in the federal system...There are ninety-four federal district courts. Every state has at least one federal district court; larger states are divided into several districts. The territorial authority of federal district courts does not cross state lines. Federal districts are often divided into divisions, but the divisions have little importance except in some instances, as a specification of venue within the district.<sup>32</sup>

8.52 In the United States, venue provisions may serve a purpose in specifying some link between an action and a place to preserve the territorial nature of the federal court's jurisdiction. The venue provisions thus specify the type of link that makes it acceptable to sue in a particular district court, for example, suits to recover taxes can be brought where the liability occurs or the debtor resides.

8.53 It is doubtful whether such provisions are needed in Australia today. Under the original *Service and Execution of Process Act 1901* (Cth), there was also a requirement for nexus between the chosen state forum and the action or the parties. For example, originating process of the New South Wales Supreme Court could only be served on a defendant in another state if there was some specified connection with New South Wales. This limitation was dispensed with in the *Service and Execution of Process Act 1992* (Cth).

8.54 The policy reflected in current legislation is to allow the plaintiff the choice to commence an action anywhere in Australia, but to supplement this with mechanisms to ensure the matter is heard in the most appropriate Australian forum. Thus, s 20 of the *Service and Execution of Process Act 1992* (Cth) enables a court to grant a stay of a proceeding commenced inappropriately in that court, while s 5 of the cross-vesting legislation enables certain matters to be transferred to a more appropriate court.<sup>33</sup> The sorts of 'hard' connecting factors identified in sections 82-84 could now be taken into account as relevant considerations in the discretionary process under the various stay and transfer procedures.

8.55 Whatever the origin of sections 82-84, there is considerable doubt about their intended scope. It is not clear whether the provisions are concerned with the recovery of penalties (that is, fines) in relation to criminal offences, or with the recovery of civil penalties such as provided by certain customs and taxation laws,

32 E Chemerinsky *Federal Jurisdiction* Little, Brown and Co Boston 1989, 24-25.

33 See *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and cognate state and territory legislation.

or both. The phrase ‘suits to recover pecuniary penalties’ is ambiguous because a suit indicates a civil proceeding, apparently therefore excluding criminal offences. However, the recovery of some civil penalties, such as those under the *Customs Act 1901* (Cth), is normally by ‘prosecution’ and not by suit.

8.56 The Commission’s terms of reference exclude criminal jurisdiction in relation to the *Judiciary Act*. However, the Commission considers that the ambiguity in s 82 and its relationship to other sections, which are clearly non-criminal in scope (for example, sections 83 and 84), justify the Commission in considering s 82 in the context of removing unnecessary provisions from the *Judiciary Act*.

### **Part VIII of the *Judiciary Act***

8.57 A second example of potentially obsolete provisions is Part VIII. This Part comprises sections 46–51 and was inserted into the *Judiciary Act* in 1984 to provide for the ‘Enforcement of certain orders concerning court proceedings’.<sup>34</sup> The legislation arises out of a raid conducted by ASIS at the Sheraton Hotel in Melbourne on 30 November 1983. As a result of that incident, some members of ASIS were prosecuted for breaches of Victorian criminal law.<sup>35</sup> The Victorian Parliament sought to protect Australian national security by authorising a court to make various orders to suppress publication of any confidential information in relation to any criminal proceedings in that State arising out of the incident.

8.58 Section 3 of the *Criminal Proceedings Act 1984* (Vic) provides that a court may, on the application of the Commonwealth Attorney-General or the Victorian Attorney-General, if it appears that it is or may be expedient in the interest of the national or international security of Australia or in the interests of the physical safety of the accused or a witness or any other person, order that proceedings take place in a closed court or exclude certain people or classes of persons or prohibit disclosure of information. Section 6 provides that the Act does not apply in relation to any order or direction made later than two years after the commencement of the Victorian Act.

8.59 The purpose of the insertion of a new Part VIII in the *Judiciary Act* was to ensure that any order made by a Victorian court under the *Criminal Proceedings Act 1984* (Vic) was effective beyond the territorial limits of Victoria. To this end, the *Judiciary Act* extends the territorial reach of an order of a Victorian court to all natural persons, whether or not they are Australian residents or citizens, and to all

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34 *Judiciary Amendment Act 1984* (Cth). The circumstances giving rise to the amendment were considered by the High Court in *A v Hayden* (1984) 156 CLR 532.

35 See Parliament of the Commonwealth of Australia *Royal Commission on Australia’s Security and Intelligence Agencies: Report on the Sheraton Hotel Incident* February 1984 Parliamentary Paper No 1/1984 AGPS Canberra 1984.

bodies corporate, whether or not they are incorporated in Australia (s 47). The Federal Court is also given the same powers to punish a person for contravention or failure to comply with an order as is possessed by a Victorian court (s 49(4)). Although the provisions of Part VIII take their colour from the context of Victorian criminal prosecutions, the extended territorial effect given to the various ‘suppression’ orders does not itself involve the exercise of criminal jurisdiction and for that reason falls within the Commission’s terms of reference.

8.60 Any assessment of the obsolescence of Part VIII requires a detailed examination of what that Part provides. First, it should be noted that s 51 is a sunset clause limiting the application of the Part to orders made within two years after the commencement of the Victorian legislation. That period expired on 27 March 1986, so that Part VIII continues to apply only to orders of a Victorian court made before that date.<sup>36</sup> Second, it should be noted that some of the orders to which Part VIII applies relate to events occurring during the conduct of a criminal proceeding. Examples are orders that a proceeding is to take place in a closed hearing (s 49(3)(a)) or that a person is to be excluded from the proceeding (s 49(3)(b)). Since in all probability there are no continuing criminal proceedings related to the specific events in 1983, those provisions are likely to be unnecessary or obsolete. Third, there is a class of orders about which further information is required. Orders prohibiting the disclosure of information about a proceeding, prohibiting the publication of a report about a proceeding, or prohibiting access to documents related to a proceeding (s 49(3)(c)–(e)) may continue to be justified by the interests of national security, notwithstanding that the events in question occurred nearly 17 years ago.

8.61 The Commission’s preliminary view is that Part VIII should be repealed to the extent that it contains provisions that are unnecessary or obsolete. The government should also assess whether any sections in Part VIII continue to be justified by considerations of national security. To the extent that some provisions of that Part remain current and justifiable, the question remains as to where they should be located. The only comments made about the location of provisions during the passage of the *Judiciary Amendment Act 1984* (Cth) came from the Opposition in reply to the Minister’s Second Reading Speech. Mr Spender stated that he had two fundamental objections — one concerned the specificity of the Bill and the other with its location in the *Judiciary Act*.

... the *Judiciary Act* is one of the important and foundational legislative provisions of this country, it is not restricted to [the High Court] but it is ... the charter subject to the Constitution which sets out how the Court is to conduct its business and what are the matters that come before the Court ... Th[e] amendment is made for a specific purpose.

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36 The *Criminal Proceedings Act 1984* (Vic) came into operation upon receiving Royal Assent on 27 March 1984.

... [it is a] somewhat bizarre proposal that this Bill should be restricted to one incident only ... It is bizarre and unnecessary to have a one-off proposal, particularly when one recalls that this proposal will go into the *Judiciary Act*. ... [it is] quite an extraordinary circumstance that [the] Act will be cluttered up with a separate part dealing with one incident ...<sup>37</sup>

**Question 8.9.** What function, if any, is served by sections 82–85 of the *Judiciary Act*, which make provision for venue in suits for pecuniary penalties, taxes and forfeiture? Should these sections be repealed?

**Question 8.10.** Should Part VIII of the *Judiciary Act*, relating to certain orders made in connection with an ASIS raid in Melbourne in 1983, be repealed in whole or part? Would Australia's current national security interests be compromised by such action?

**Question 8.11.** What provisions of the *Judiciary Act*, other than sections 82–85 and Part VIII are unnecessary, obsolete or otherwise ripe for repeal?

## Relocating provisions to related Acts

8.62 Some provisions of the *Judiciary Act* might be considered suitable for relocation to related Acts, depending on the underlying purpose of the Judiciary Act and the other Acts. Some specific examples of this are considered further below.

### Jurisdiction of the Federal Court

8.63 Section 39B makes provision for the original jurisdiction of the Federal Court. As discussed in Chapter 2, s 39B(1) grants the Federal Court original jurisdiction in relation to matters specified in s 75(v) of the Constitution. This amendment was introduced in 1983 to reduce the workload of the High Court by allowing actions for prerogative relief against Commonwealth officers to be commenced in the Federal Court.<sup>38</sup> An amendment in 1997 added s 39B(1A), which confers on the Federal Court original jurisdiction in relation to certain matters under s 76 of the Constitution.<sup>39</sup> It is strongly arguable that s 39B should be relocated to the *Federal Court of Australia Act* because it concerns only the jurisdiction of the Federal Court, which is already partly defined in the latter Act.

<sup>37</sup> *Hansard* (H of R) 29 March 1984, 1010–2.

<sup>38</sup> *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth). Also see *Hansard* (H of R) 21 September 1983, 1049.

<sup>39</sup> *Law and Justice Legislation Amendment Act 1997* (Cth).

On the other hand, it might be argued that the section is an important aspect of the allocation of federal jurisdiction between Australian courts and on that basis should be maintained in the *Judiciary Act*.

### Appeals from the Family Court

8.64 Chapter 4 considered s 95(b) FLA, which enables an appeal to be brought to the High Court from the Full Court of the Family Court upon a certificate of the Family Court, without the usual requirement of special leave of the High Court. Although this provision is located in the *Family Law Act*, it could be argued that other Acts provide a more appropriate location. Section 95(b) concerns the channels of appeal between the Family Court and the High Court and on this basis might be located in the same place as other aspects of High Court appeals (currently in the *Judiciary Act* but potentially in the *High Court of Australia Act*).

### High Court practice and procedure

8.65 The criteria for relocation and consolidation discussed above suggest that provisions of the *Judiciary Act* that currently deal with the High Court's practice and procedure and its jurisdiction should be relocated to the *High Court of Australia Act 1979*. The intention behind such a change would be to locate in one Act every provision that is concerned with the High Court's organisation, powers, practice and procedure. This may provide greater coherence to the legislation and increase accessibility. Users of the High Court, especially non-lawyers, would be more likely to expect to find all provisions dealing with the Court's jurisdiction, powers, practice and procedure in an Act bearing the Court's name.

8.66 Provisions that might be relocated on this basis include Parts XA and XB. Part XA (Procedure of the High Court) concerns trials, including directions as to whether trials are to be with juries, the giving of evidence, amending defects or errors, reserved judgments, judgment and execution, and appointing receivers and managers in particular cases. Part XB (Appeals to the High Court) deals with the giving of security for appeals, stay of proceedings, and death of a party to an appeal.

8.67 Other Parts that relate to jurisdiction and powers, and which may be amenable to relocation, include Part III (Jurisdiction and Powers of the High Court Generally); Part IV (Original Jurisdiction of the High Court); Part V (Appellate Jurisdiction of the High Court); and Part VII (Removal of Causes). See Chapters 2, 3 and 4 for further discussion.

8.68 A particular issue that arises in relation to the High Court is the location and potential duplication of the power to make Rules of Court.<sup>40</sup> Section 86 JA gives the Court a broad power to make Rules of Court necessary or convenient for carrying into effect the provisions of the *Judiciary Act* ‘or so much of the provision of any other Act as confers jurisdiction on the High Court or relates to the practice and procedure of the High Court’. The section then lists seven non-exclusive categories, including Rules ‘generally regulating all matters of practice and procedure in the High Court’. However, the *High Court of Australia Act* also makes provision for making Rules of Court. Section 48 of that Act extends the rule-making power of the justices under s 86 JA to anything that is necessary or convenient to be made for carrying into effect the provisions of the *High Court of Australia Act*. There are thus two sources of power to make Rules of Court for the High Court — the *Judiciary Act* and the *High Court of Australia Act*. Arguably, the broader power under the *Judiciary Act* makes the power under the *High Court of Australia Act* unnecessary. At the very least, the power of the Court to make Rules of Court could be simplified by reducing them to a single provision in a single location.

**Question 8.12.** Should all provisions relating to the original jurisdiction of each federal court be located in the Acts establishing those courts?

**Question 8.13.** Should all provisions relating to the appellate jurisdiction of each federal court be located in the Acts regulating the jurisdiction of the court from which an appeal is taken or in the Acts regulating the jurisdiction of the court to which an appeal is brought?

**Question 8.14.** Should Parts XA and XB of the *Judiciary Act*, and other provisions relating to the High Court’s practice and procedure, be relocated to the *High Court of Australia Act*?

**Question 8.15.** Are the two sources of the High Court’s power to make Rules of Court, namely s 86 of the *Judiciary Act* and s 48 of the *High Court of Australia Act*, necessary? If not, in which Act should the power be located and how broadly should the power be cast?

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40 This duplication can be seen in legislation with respect to the High Court as originally enacted: compare s 86 JA with the *High Court Procedure Act 1903* (Cth), s 32–33.

## Relocating provisions to new Acts

8.69 Not all provisions that may warrant relocation from the *Judiciary Act* can be conveniently moved to existing legislation. This is especially so in relation to those parts of the Act that deal with legal practitioners, the Australian Government Solicitor, and the Attorney-General's Legal Services Directions. These matters are addressed below.

### Legal practitioners

8.70 One of the earliest amendments made to the *Judiciary Act* in 1906 extended the rule-making power of the High Court to the admission to practice of barristers and solicitors.<sup>41</sup> Since then, and most importantly in 1966, there have been a number of amendments dealing with legal practitioners.<sup>42</sup> Currently, Part VIIIA concerns the right of legal practitioners admitted in federal courts to practise in those courts (s 55A). It also concerns the rights of legal practitioners admitted in state or territory courts to practise in any federal court or state court exercising federal jurisdiction (s 55B) and in any territory (s 55D). The Part also provides for the establishment of a register of practitioners who have a right to practise in federal courts and courts exercising federal jurisdiction (s 55C). Other provisions in the Part deal with the practice rights and obligations of lawyers engaged by the Attorney-General's Department (s 55E–G) and legal costs of lawyers employed by a state, the ACT or the Northern Territory in relation to Commonwealth proceedings (s 55H).

8.71 Part VIIIA needs to be put in the context of the general schemes for practising rights in state and territory courts. Legal practitioners in each state and territory are admitted as officers of their respective Supreme Courts and there is no automatic right flowing from such admission to practise in the courts of another state or territory or to practise in federal courts. Part VIIIA provides for such a right in relation to federal courts and other courts exercising 'federal-type' jurisdiction. Under the *Mutual Recognition Act 1992* (Cth), a person registered to practise a profession or occupation in one state is able to practise in another state, subject to registration with the relevant regulatory authority in the other state. Complementary legislation was passed in all states on the subject of mutual recognition.<sup>43</sup> However, these amendments did not affect the right to practise in federal courts and in courts exercising federal jurisdiction.

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<sup>41</sup> *Judiciary Act 1906* (Cth).

<sup>42</sup> See *Judiciary Act 1966* (Cth), which inserted s 55A–55E.

<sup>43</sup> For a description of the development of practice rules see Australian Law Reform Commission *Review of the federal civil justice system* (ALRC DP 62) ALRC Sydney 1999 para 5.14–5.26.



8.72 There have since been further developments in interstate practice. On 1 July 1997 Schedule 1 of the *Legal Profession Amendment (National Practising Certificates) Act 1996* (NSW) was proclaimed to commence. This Act amended the *Legal Profession Act 1987* (NSW) to allow for recognition by the Attorney-General of corresponding laws passed by other states and territories to enable NSW legal practitioners to practise without the necessity of obtaining a practising certificate in participating states and territories. Similarly, practitioners from those recognised states and territories can practise in NSW using their home state or territory certificate. Under this scheme, mutual recognition has already occurred between NSW and the ACT, NSW and Victoria, and NSW and South Australia. If a comprehensive national practising scheme were to be introduced which covered federal courts and courts exercising federal jurisdiction, there might not be a need for the practising rights established under Part VIIIA. However, currently there appears to be a continuing need for those provisions.

8.73 Different views might be taken of the appropriateness of locating the provisions regarding legal practitioners in the *Judiciary Act*. On one hand, the current location might be seen as quite appropriate. This is because, by establishing a legal practitioner's right of practice in federal courts, territory courts and state courts exercising federal jurisdiction, Parliament is making effective the conferral of jurisdiction on those courts. On the other hand, the provisions may be seen as peripheral to the core purpose of the *Judiciary Act* in providing for the judicial power of the Commonwealth. On this view, another home would have to be found for the provisions of Part VIIIA, possibly in a new Act.

### **Australian Government Solicitor**

8.74 A number of recent amendments to the *Judiciary Act* have established the AGS as a corporate entity.<sup>44</sup> It is difficult to reconcile these amendments with the original object of the *Judiciary Act*. Parliamentary debate on the *Law and Justice Legislation Amendment Act (No 3) 1992* referred to the need for greater accountability and resource control within the government, and to the reform of the legal services market for Commonwealth legal work.<sup>45</sup> During the passage of the *Judiciary Amendment Act 1999* (Cth), the Attorney-General announced that the legislation would significantly reform the legal services market for Commonwealth legal work and establish the AGS as a statutory corporation that would operate as a government business enterprise.<sup>46</sup> The establishment of the AGS as a statutory corporation, albeit practising in federal legal matters, may appear to have little

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44 The amendments relating to the AGS began with the *Judiciary Amendment Act (No 2) 1984* (Cth). The *Law and Justice Legislation Amendment Act (No 3) 1992* (Cth) also inserted provisions relating to the AGS but this legislation was repealed by the *Judiciary Amendment Act 1999* (Cth), which set up the AGS as a corporate entity.

45 *Hansard* (H of R) 3 November 1992, 2446

46 *Hansard* (H of R) 3 December 1998, 1274.

direct connection with the exercise of federal judicial power. However, this may depend on how broadly the object of the Act is construed. One view is that Part VIIIB of the Act is discrete and should be the subject of separate legislation.

### Attorney-General's Legal Services Directions

8.75 The *Judiciary Amendment Act 1999* (Cth) inserted a new Part VIIIC in the Act providing for the Attorney-General's Legal Services Directions. These are directions issued by the Attorney-General in relation to the conduct of Commonwealth legal work (s 55ZF). A number of such Directions have been issued pursuant to the section.<sup>47</sup> The parliamentary debates contain no discussion of why the amendments were located in the *Judiciary Act*. As with the amendments related to the AGS described above, it is difficult to categorise Part VIIIC with respect to Legal Services Directions as a provision for the exercise of federal juridical power, and accordingly consideration ought to be given to its relocation in another Act.

**Question 8.16.** Should the provisions of Part VIIIA, relating to the rights of practice of solicitors and barristers, be retained in the *Judiciary Act* or relocated to another Act?

**Question 8.17.** Should the provisions relating to the Australian Government Solicitor and the Attorney-General's Legal Services Directions (Parts VIIIB and VIIIC of the *Judiciary Act*) be relocated in a new Act?

### Provisions with respect to the territories

8.76 A question that arises in the present context is whether the provisions of the *Judiciary Act* that relate to territories ought to be kept in that Act or relocated to another Act. The principal provision of the *Judiciary Act* dealing with territories are

- ?? s 3A, which provides that the 'Act extends to all the territories'
- ?? Part IXA, which deals with suits relating to the Northern Territory
- ?? numerous provisions that referred to states alone when first enacted but which have since been amended to extend their operation to the territories, and
- ?? s 35AA, which provides for appeals from the Supreme Court of the Northern Territory to the High Court.

<sup>47</sup> *Legal Services Directions* issued by the Attorney-General with effect from 1 September 1999: <http://law.gov.au/aghome/legalpol/olsc/legalservices/directionsnew.pdf> (28 June 2000).

8.77 The nature of judicial power exercised in the territories is discussed in Chapter 7. Although doubts have been expressed from time to time about whether territory courts exercise the judicial power of the Commonwealth, in *Northern Territory v GPAO*,<sup>48</sup> the High Court affirmed that, at least in some circumstances, they do exercise that power. That conclusion is significant for the issue of location because it suggests that those sections dealing with territory courts are not alien to the underlying theme of the *Judiciary Act* in regulating the judicial power of the Commonwealth.

8.78 The question remains whether specific sections dealing with territories warrant relocation. This question ought to be answered by reference to the same criteria identified earlier in this Chapter. For example, it may be argued that s 35AA, which states that the High Court has jurisdiction to hear and determine appeals from judgments of the Supreme Court of the Northern Territory, is best located with other provisions dealing with the High Court's appellate jurisdiction, preferably in the *High Court of Australia Act*.

8.79 Similar issues arise as to Part IXA, which deals with suits relating to the Northern Territory. Section 67B confers jurisdiction on the Supreme Court of the Northern Territory with respect to suits between the Commonwealth and the Northern Territory. Section 67C provides that the Northern Territory Supreme Court's jurisdiction extends to injunctions, declaratory orders or writs of mandamus sought by the Commonwealth against the Territory or an officer of the Territory.

8.80 If these sections are retained (see Chapter 7), different views might be taken as to the best place to locate them. One view is that they concern the allocation of federal jurisdiction and on that basis should be retained in the *Judiciary Act*. This would treat the sections in an analogous fashion to s 39, which invests state courts with federal jurisdiction. An alternative view is that sections 67B and 67C should be regarded as specific allocations of jurisdiction in respect of the Supreme Court of the Northern Territory and on that basis placed in the Act establishing that Court. However, that course is not open to the Commonwealth because the Supreme Court of the Northern Territory is now established by an Act of the Northern Territory Legislative Assembly.<sup>49</sup> The closest the Commonwealth could come in attempting such relocation is to place the jurisdictional provision in the Commonwealth legislation granting the Northern Territory self-government, namely the *Northern Territory (Self-Government) Act 1978* (Cth).

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48 (1999) 196 CLR 553.

49 *Supreme Court Act 1979* (NT).

**Question 8.18.** Should some or all of the provisions of the *Judiciary Act* relating to the territories be relocated to other legislation, including the legislation granting the territories self-government?